IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 10 of 2010

BEFORE

The Rt Hon Sir John Chadwick, President
The Hon Elliott Mottley, Justice of Appeal
The Hon Dr Abdulai Conteh, Justice of Appeal

ON APPEAL FROM THE GRAND COURT
FINANCIAL SERVICES DIVISION
(FSD No 0048/2009)
(Formerly Cause No 104 of 2009)

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)
AND
IN THE MATTER OF FREERIDER LIMITED

BETWEEN

ADRIANUS JOHANNES HEINEN
Petitioner/Respondent to Appeal

-and-

PIETER LE COMTE
Respondent/Appellant

Mr Alan Turner and **Ms Rowena Lawrence** of Turner & Roulstone
for the appellant, Mr Le Comte
Mr Jonathan Crow QC, with **Ms Katie Brown**, instructed by
Appleby for the respondent to the appeal, Mr Heinen

Hearing dates: 23 and 24 August 2010. Judgment delivered 24 August 2010.
Reasons released 4 August 2011

JUDGMENT

Sir John Chadwick, President:

1. On 13 May 2010 Justice Foster QC ordered that Freerider Limited, an exempted company incorporated in the Cayman Islands ("the Company"), be wound up by the Court pursuant to section 92(e) of the Companies Law (2009

Revision). The order was made on a petition presented by Mr Adrianus (or Arjan) Heinen, one of the two holders of Class A (voting) shares in the Company. The other holder of Class A shares, Mr Pieter Le Comte, was the respondent to the petition.

2. Mr Le Comte appealed from that order. At the conclusion of the hearing of the appeal this Court dismissed the appeal. The Court stated that it would put the reasons for that decision in writing.

3. The order of 13 May 2010 reserved the costs of the petition to a further hearing. At that further hearing on 25 June 2010 the judge ordered that Mr Le Comte pay the petitioner's costs of the petition on the standard basis; such costs to be taxed if not agreed. By a respondent's notice filed in Mr Le Comte's appeal (as amended on 16 July 2010) Mr Heinen sought to vary that order: he sought an order that the costs of the petition be taxed on an indemnity basis. At the conclusion of the hearing of the appeal the Court reserved its decision on that issue.

Section 92(e) of the Companies Law (2009 Revision)

4. Section 92(e) of the Companies Law provides that a company may be wound up by the Court "if the Court is of opinion that it is just and equitable that the company should be wound up." As Lord Millett pointed out in *CVC/Opportunities Equity Partners Limited and another v Demarco Almeida* [2002] CILR 77, a corresponding provision in identical terms has formed part of the company law of England and Wales since the middle of the nineteenth century. The application of that provision has been the subject of judicial guidance in numerous decisions in the Courts of England and Wales. In a well known passage in his speech in *In re Westbourne Galleries Limited, Ebrahimi v Westbourne Galleries Limited and others* [1973] AC 360, 379B-D, Lord Wilberforce explained that:

> ". . . The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are

> individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The 'just and equitable' provision does not . . . entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, in inequitable, to insist on legal rights, or to exercise them in a particular way."

The circumstances leading to the incorporation of the Company

5. The Company was incorporated in June 2003 as one of a number of corporate vehicles within a structure established by agreement between Mr Heinen and Mr Le Comte for the purpose of carrying on a joint venture. The circumstances leading to that agreement were set out by the judge at paragraphs 6 to 8 of his judgment:

> "6. Mr Heinen and Mr Le Comte are both from the Netherlands. They became friends when Mr Heinen was 23 and Mr Le Comte was 19. However, they subsequently went their own ways and in 1979 Mr Le Comte moved to study and then work in the United States of America. He has lived there ever since and for some 22 years he ran an advertising agency from which he retired in 2001. He lives in Bedford, New York. Mr Heinen, on the other hand, remained in or near Apeldoorn in the Netherlands where he worked as an engineer. In the early 1980's he invented and then spent many years developing a device known as TheWheel. As Mr Heinen explained it, TheWheel is a direct drive electrical wheel which can propel any vehicle, whether a car, bus or truck, at high efficiency, saving approximately 40% to 50% of the energy currently required to propel a normal vehicle. It is a complete, integral unit but it also requires a specialized energy system with associated computer software to operate it. It enables a vehicle to dispense with both a drive axle and a gear box. In a diesel engine driven vehicle, for example, the size of the diesel engine can be dramatically reduced with a consequent fuel saving of approximately 50%. TheWheel itself is powered by electricity which can be generated by a diesel or petrol engine or by a fuel cell. There are variations

of it and different prototypes adapted for use on different types of vehicle in different circumstances. Mr Heinen has also invented other transportation related devices, such as, for example, his Emission Particle Extractor, which is designed to remove contaminants from engine emissions centrifugally. TheWheel in particular is an invention with very considerable potential significance from a worldwide environmental perspective.

7. Mr Heinen's work on and development and exploitation of TheWheel and his other inventions obviously required and requires financing. In 2001 he established a Dutch company for carrying on his engineering business - Special Products For Industry BV ('SPI') - and he registered patents in several parts of the world to protect the intellectual property in TheWheel. He obtained some financing, in particular to meet the costs of other overseas patent registrations, from various relations and friends, including Mr Van der Sluis and other members of the Van der Sluis family. These third party investors became known (and were referred to at the hearing) as 'the Investor Group'. Mr Heinen also has a Dutch personal holding company, AJ Heinen Apeldoorn Beheer BV ('AHAB') which owned the shares of SPI.

8. Mr Heinen, however, badly needed further financing to be able to continue his work on TheWheel and when he and Mr Le Comte became re-acquainted about the time of Mr Le Comte's retirement, Mr Le Comte became interested in assisting him, personally as his close friend. . . . After many discussions between Mr Heinen and Mr Le Comte during 2001 and 2002, they agreed in the spring of 2003 to join forces together on an equal basis in order to promote and finance the further development and marketing of TheWheel and associated technology, taking advantage of their complementary skills and experience, Mr Le Comte obviously had a business and commercial background and corporate experience. Mr Heinen had the engineering and technological knowledge and skill in relation to TheWheel and his other inventions and their potential. It was in effect to be a joint business venture between two close friends. Mr Le Comte had considerable financial resources and his involvement in the venture was to be financial, whereas Mr Heinen's investment would be the subject matter of the venture, namely TheWheel and his other inventions and the associated intellectual property."

6. As the judge explained, it was left to Mr Le Comte, with assistance from lawyers in New York, to devise and set up a structure through which he and

Mr Heinen would carry on the joint venture. The structure adopted is set out by the judge in the form of a diagram at paragraph 9 of his judgment. It is sufficient, for the purposes of this judgment, to refer to the following features:

(1) The Dutch company through which Mr Heinen had carried on his engineering business (SPI) was renamed e-Traction Europe BV ("EEU") and its shares were transferred to a Luxembourg limited partnership, e-Traction Worldwide SCA ("EWW").

(2) The general partner of EWW was a Luxembourg corporation, e-Traction Management S.A.R.L ("EMS"), of which Mr Heinen, through his holding company (AHAB), and Mr Le Comte were the shareholders,

(3) The limited partners of EWW were Mr Heinen (through AHAB), Mr Le Comte, the Investor Group (to which the judge had referred at paragraph 7 of his judgment) and the Company (Freerider Limited).

(4) The shares in the Company were held by Mr Heinen (or AHAB), Mr Le Comte and the Investor Group.

(5) Mr Heinen and Mr Le Comte were the sole directors of EEU, EMS and the Company.

7. As the judge went on to explain (at paragraph 13 of his judgment) the Company was introduced into the structure for the purpose of obtaining tax benefits. As he put it: "It was to enable payments generated by the commercial exploitation of the intellectual property in TheWheel to be made to an entity in a tax free jurisdiction and not therefore subject to taxation in the Netherlands". The Company's shares were divided into three classes: Class A Shares with voting rights but no rights to dividend; Class B Shares with no voting rights, but with rights to dividend; and Class C Shares with no voting rights and no rights to dividend, but with rights of conversion into Class B Shares. As I have said, Mr Heinen (or AHAB) and Mr Le Comte were, together, the holders of all the Class A Shares. The Investor Group held Class B and Class C Shares.

The shareholders' agreements

8. Mr Le Comte and the lawyers in New York produced two shareholders' agreements. Each is dated 19 July 2003; and each is expressed to be governed by the law of New York. One, to which the judge referred as "the Second Shareholders' Agreement", related to the Class B and Class C Shares in the Company; and, in particular, to the conversion rights attaching to the Class C Shares. It is of little or no relevance to the issues on this appeal. The other, to which the judge referred as "the First Shareholders' Agreement", is directly relevant to the contentions advanced on behalf of Mr Le Comte: as the judge put it at paragraph 11 of his judgment: "Mr le Comte relied very heavily upon the provisions of the First Shareholders' Agreement in his opposition to the Petition".

9. The First Shareholders' Agreement related both to the management of the Company (as one of the limited partners of EWW) and to the management of EMS (the general partner of EWW). The parties to the agreement were the Company, EMS, Mr Le Comte and Mr Heinen. Mr Le Comte and Mr Heinen were described in the agreement as "the Managers". Section 1 of the agreement was in these terms, so far as material:

> "Voting: Management (a) At any Annual, Special or other meeting called for such purpose; and whenever the Managers act by written consent, each Manager agrees (i) to vote or otherwise give such Manager's consent in respect of all shares of voting capital stock of Freerider or EMS, as applicable (whether now or hereafter acquired), owned by such Manager or as to which such Manager is entitled to vote, (ii) to cause Freerider, in such Manager's capacity as an officer or director or otherwise of Freerider, to take all necessary or desirable actions within its control and (iii) to cause EMS, in such Manager's capacity as an officer or director or otherwise of EMS, to cause [EWW], in its capacity as general partner of [EWW], to take all necessary and desirable actions within its control, in each case in order to cause:
>
> (i) with regard to any technical issue pertaining to the intellectual property of either Freerider or EMS (not including, however, legal issues with regard thereto, whether relating to the filing and prosecution of patents, the licensing of intellectual property and the granting of rights under any intellectual property to third parties or

otherwise), all votes to be carried in favor of, and/or all actions to be taken and documents and instruments to be executed in accordance with, the recommendation with regard thereto made by Heinen in his sole discretion; and

(ii) with regard to all other business or legal issues of Freerider or EMS (including, without limitation, issues pertaining to entity structure (including the composition of the Board of Directors or other similar body), management structure, strategic or other business partnerships, marketing or other business plans and strategies, filing and prosecution of patents, the licensing of intellectual property and the granting of rights under any intellectual property to third parties), all votes to be carried in favour of, and/or all actions to be taken and documents and instruments to be executed in accordance with, the recommendation with regard thereto made by Le Comte in his sole discretion."

The agreement included, also, provisions restricting the sale or other transfer by Mr Le Comte or Mr Heinen (other than to a spouse or lineal descendant) of shares in either the Company or EMS without the prior written consent of the other Manager. It provided that, notwithstanding that the governing law was to be the law of New York, issues relating to the internal corporate governance of the Company were to governed by the corporate law of the Cayman Islands; and that issues relating to the internal corporate governance of EMS were to be governed by the limited liability company law of Luxembourg.

The inter-company agreements

10. Mr Le Comte and the New York lawyers produced three further agreements in connection with the joint venture. In summary, these were:

(1) An agreement (the "Asset Purchase Agreement" or "APA") between EEU (formerly SPI) and the Company for the sale and transfer to the Company of certain intellectual property in TheWheel together with a worldwide irrevocable and exclusive licence in respect of overseas patents relating to that intellectual property with the right to sell, lease or otherwise dispose of and exploit that intellectual property.

(2) An agreement (the "Technology Advisory Services Agreement" or "TASA") between the Company, EWW, EEU and e-Traction North

America ("ENA", a company which, like EEU, was owned by EWW) which required the e-Traction Group (EEU, ENA and EWW) to provide services to the Company by way of assistance with regard to the intellectual property rights in TheWheel which had been transferred to the Company pursuant to the APA.

(3) An agreement (the "Intellectual Property Licence Agreement" or "IPLA") between the Company and the e-Traction Group which provided for the grant by the Company back to EEU and the other entities in the e-Traction Group of a non-exclusive, revocable and non-assignable sub-licence in respect of the intellectual property in TheWheel which had been transferred to the Company pursuant to the APA. The IPLA provided for royalties to be payable by the e-Traction Group to the Company, based on the price of each of the licensed products sold by the E-Traction Group anywhere in the world and subject to a minimum annual payment of €500,000.

The genesis of the dispute

11. The judge found that all went well until the early part of 2005. In particular, he found (at paragraph 17 of his judgment) that Mr Le Comte did provide substantial financing (amounting to at least €1.3 million) in the two years from 2003 to 2005; and (at paragraph 18) that there was frequent contact between Mr Heinen and Mr Le Comte by telephone and e-mail in the course of which they "discussed at length all aspects of the business, technical, financial and strategic". The judge noted that there were no formal company meetings or minutes; but that "Mr Le Comte made frequent visits to the Netherlands to discuss everything concerning the joint venture business with Mr Heinen and they met business prospects together".

12. The judge found, also, that during the early part of 2005 relations between Mr Heinen and Mr Le Comte began to become strained; and that "the previous regular communications and the provision of information about Freerider by Mr Le Comte reduced". In the judge's view "this was largely as a result of their increasingly different views on Mr Heinen's ongoing work on TheWheel

and his other inventions and the way in which EEU was conducting business". He identified the different views of Mr Heinen and Mr Le Comte in the following passage of his judgment:

> "19. . . . Mr Heinen explained in evidence that, in the course of research and development of newly invented devices like The Wheel and its related technology, inevitably technical problems are encountered because the devices are entirely unprecedented concepts. Mr Heinen's firm view was that the only way in which meaningful testing and development of his various technologies could take place was through embarking on projects with third parties involving their use for different purposes and in different environments on a commercial basis. . . . It was also Mr Heinen's firm belief that engaging in commercial customer projects involving his various technologies, or variations of them, was the only way in which EEU could earn the necessary funds to finance its ongoing development and testing of such technologies and the production of new prototypes. His view was that without undertaking regular fee based projects, whether involving TheWheel or not, EEU would not be able to afford to continue its work on further developing and refining TheWheel and other technology and to meet its operating costs. Mr Le Comte was firmly opposed to that approach. His view was that such commercial projects should not be carried out until the development of the technology was finalized and he became increasingly frustrated by what he perceived as the unreliability of Mr Heinen's projects and the cost they involved. . . ."

13. The judge formed a "clear impression, in the light of the evidence" that, over time, Mr Le Comte began to lose confidence in the expertise of Mr Heinen and EEU and in Mr Heinen's ability to carry through, with success, commercial projects with third party customers involving applications of TheWheel and related technology; and that Mr Le Comte "began to express that view more and more forcefully to Mr Heinen". As the judge put it, in a later passage of his judgment (at paragraph 53), "Mr Le Comte's increasing loss of faith in Mr Heinen's technological abilities and in TheWheel itself" was the real cause of the breakdown in the relationship between them.

The breakdown in the relationship

14. The judge found that, during 2005, Mr Le Comte began to make it clear to Mr Heinen that he was unwilling to allow the Company to continue to provide

further funding to EEU unless Mr Heinen agreed with and adopted his view of how the business of EEU should operate; and that, by the middle of that year, Mr Le Comte told Mr Heinen that funding would only be provided to EEU to keep the business going for a further six months and not thereafter unless he (Mr Heinen) adopted Mr Le Comte's views. Mr Heinen's response was to approach the Investor Group for further funding. Substantial funding from the Investor Group was obtained following a meeting in November 2005. But, as the judge put it, "by this time relations between Mr Le Comte and Mr Heinen had become very poor and difficult and there was effectively a deadlock between them".

15. The judge explained that "matters came to something of a head in August 2006". He said this:

> "22. . . . On 15 August 2006 on Mr Heinen's evidence Mr Le Comte told Mr Heinen on the phone that, although Freerider had funds, neither it nor he would provide any further funding to EEU. He also, as Mr Heinen said in evidence, told Mr Heinen that he was no longer going to act as CEO of the e-Traction Group companies and that he was leaving EEU's problems to Mr Heinen to resolve."

Mr Heinen followed that telephone call with an e-mail to Mr Le Comte dated 16 August 2006. He wrote (as translated from the text, which is in Dutch) in the following terms (so far as material):

> "As you know, I have been responsible for the technical side of the business for some time now, while you're in charge of marketing and management.
>
> I have complied with your management strategy. . . .
>
> As you told me last night, we own several businesses that are essentially shell companies, and you made it clear to me last night that I should no longer expect you, as the CEO of these companies, to provide solutions to the current situation.
>
> Your expectations of me as the CTO is therefore that I propose solutions to the management of the only operative division of the companies, in order to ensure that all the businesses will survive.
>
> I am prepared to take on this responsibility, . . .

> I believe there's no point at all in continuing to dig into the past of the companies, so I have no intention of doing that. August 1 will mark a clean break with the past, and this rupture will occur with or without consent.
>
> . . ."

In that context, "the only operative division of the companies" is a reference to the e-Traction Group; or, perhaps, to EEU alone.

16. The judge found that Mr Le Comte did not reply to the e-mail of 16 August 2006. Mr Heinen took effective control of EEU. Mr Le Comte offered to sell his interest in the Company and the e-traction Group to the Investor Group; but, by October 2006, it had become clear that agreement could not be reached on the price. Thereafter, as the judge found, relations between Mr Heinen and Mr Le Comte continued to deteriorate. Mr Heinen was entirely excluded by Mr Le Comte from the management of the Company and was provided with no copies of its accounts or other records.

The attempt to remove Mr Heinen as a director of EMS and EWW

17. In June 2007 Mr Le Comte, as a director of EMS (the general partner of EWW), caused that company to commence proceedings in the Luxembourg courts to remove Mr Heinen from his directorship of that company and of EWW. The attempt failed.

The proceedings in the Netherlands

18. In July 2007 Mr Le Comte caused the Company to commence proceedings against EEU in the District Court of Zutphen claiming royalty payments said to be payable by EEU to the Company under the terms of the IPLA. He also caused the Company to levy pre-judgment attachments on bank accounts and other assets of EEU. Those proceedings were defended by EEU. It seems that, at the date of the hearing of the petition, those proceedings remained pending.

19. In September 2007 proceedings were commenced by employees of EEU in the Enterprise Chamber of the Amsterdam Court of Appeal seeking that court's intervention in the management of EEU. The ground relied upon was that

there was deadlock between the two directors, Mr Heinen and Mr Le Comte. On 16 October 2007 the Enterprise Chamber suspended both Mr Heinen and Mr Le Comte; it appointed an interim director (Mr Van der Ven) in their place. At the same time the Enterprise Chamber appointed an independent lawyer (Mr van Hees) to conduct an investigation into EEU's management and to report with his recommendations. On 14 December 2007 Mr Van der Ven resigned; following, it is said, a threat of litigation by Mr Le Comte. On the same day, 14 December 2007, the Enterprise Chamber confirmed the suspension of Mr Le Comte from his office as a director of EEU; and reinstated Mr Heinen. On the recommendation of the Enterprise Chamber Mr Van der Ven was appointed as consultant to assist Mr Heinen. The Enterprise Chamber directed that the shares in EEU (held by EWW) be held by a trustee: with the object (it is said) of preventing Mr Le Comte from causing EWW to exercise any shareholder rights in respect of EEU. On 8 September 2008, following consideration of a report by Mr van Hees, the Enterprise Chamber issued a final decision in which it concluded that there was deadlock between Mr Heinen and Mr Le Comte; held that Mr Le Comte was responsible for mismanagement of EEU; removed Mr Le Comte permanently from office as a director; and ordered that the shares in EEU be held by a trustee for at least two years. We were informed that Mr Le Comte had sought to appeal to the Supreme Court of the Netherlands from the findings of the Enterprise Chamber; but that his appeal had been rejected.

The proceedings in New York

20. On 31 March 2008 EEU gave notice to the Company purporting to terminate the three inter-company agreements: that is to say, the APA, the TASA and the IPLA. Mr Le Comte, purportedly acting on behalf of the Company but without consulting Mr Heinen, his co-director, refused to accept the termination of those agreements. In July 2008 Mr Le Comte caused the Company to commence proceedings in New York against Mr Heinen, EEU and certain members of the Investor Group. The claims in those proceedings included claims for breach of contract in respect of the three inter-company agreements

and the First Shareholders' Agreement. We understand that those proceedings remain pending.

The demand that Mr Heinen resign as a director of the Company

21. On 7 August 2008 Mr Le Comte demanded that Mr Heinen resign as a director of the Company: further, he contended that he was entitled, pursuant to the First Shareholders' Agreement, to remove Mr Heinen as a director of the Company.

The judge's assessment of the parties

22. The judge had the advantage of seeing Mr Heinen and Mr Le Comte give their evidence in the course of the hearing before him. He expressed his views at paragraphs 51 and 52 of his judgment. He said this of Mr Heinen:

> "51. . . . My impression was that Mr Heinen is an honest man caught up in a dispute over corporate complexities not really of his making. It was clear to me that his only real interest was and is in TheWheel, which even Mr Le Comte described as 'his baby'. Mr Heinen's interest in the business was and is essentially non-material and he is not, it seems to me, interested in the corporate niceties of the structure which Mr Le Comte devised. He seems to me to genuinely regret the way things have turned out but is nonetheless determined to protect and preserve the technology which he has spent many years in developing, the main significance of which to him is the significant environmental benefit which he clearly believes it will bring. . . . He did not strike me as a man who could 'hijack' any company or be involved in fraud or misappropriation of funds which he did not genuinely believe, for good reason, he was entitled to."

23. The judge's view of Mr Le Comte was much less favourable. He said this:

> "52. . . . I was left with a considerable degree of cynicism about the real motives behind [Mr Le Comte's] actions, particularly the litigation he has purported to procure Freerider to bring, not only against Mr Heinen but also against EEU, a company of which he was himself a director until suspended by the Enterprise Chamber in October 2007. . . . The overall impression which he gave to me was of an obdurate and uncompromising businessman who now seems to have almost a paranoia that he is the victim of a wide ranging conspiracy to deprive him of any influence over the business and of his investment in it. He alleges improper conduct or partiality by anyone who disagrees with him, including even the President of the Enterprise Chamber of

> the Netherlands Court of Appeal, and appears to distrust all the many people who have been involved with the business in any way, including independent professionals. He is unwilling to accept that he has done anything wrong or inappropriate, that there may be another point of view or that he is in anyway to blame for what happened. As far as he is concerned he has legal right on his side."

In an earlier passage of his judgment (at paragraph 8) the judge had observed that it seemed to him clear on the evidence that Mr Le Comte's interest in assisting Mr Heinen to continue work on TheWheel was "because he saw the potential of Mr Heinen's invention and anticipated significant financial return from investment in it within a relatively short time". At paragraph 19, the judge commented (in the context of describing the difference of views) that "there was also an increasing concern on [Mr Le Comte's] part at the length of time, it was becoming apparent, which it would take him to make any return on his own financial investment in the business".

24. The judge said that, "having observed their respective demeanour and manner, the way in which they answered questions and my assessment of their reliability", he much preferred the evidence of Mr Heinen to that of Mr Le Comte. His impression of Mr Heinen was that "he answered the questions put to him in his extensive cross-examination honestly and to the best of his ability given the occasional language difficulty and [given] the main focus of his interest . . .". He found Mr Le Comte, on the other hand, not to be "a satisfactory or objective witness": his evidence was, in some respects, "evasive and inconsistent with or contrary to the written record": and, on occasions "he endeavoured to introduce new evidence in endeavouring to justify his actions or statements".

The issues before the judge

25. The judge identified (at paragraphs 35 and 36 of his judgment) the principal issues which, as he thought, he needed to address. He said this:

> "35. Mr Heinen, the petitioner, contends that Freerider is a quasi-partnership between Mr Heinen and Mr Le Comte and that the relationship of mutual trust and confidence between them has

irretrievably broken down, making it just and equitable that Freerider should be wound up. He also contends that Freerider should be wound up because he (and the other investors in Freerider) have justifiably lost confidence in Mr Le Comte because of a lack of probity in his conduct of Freerider's (and EEU's) affairs. In addition Mr Heinen submits that the Court should wind up Freerider on the just and equitable ground because the 'substratum' of the company has been lost because the underlying purpose for which it was incorporated is incapable of achievement as a result of a Dutch tax ruling in 2008. It is said that it is now impossible for Freerider to carry on its business in accordance with the reasonable expectations of its shareholders. . . . .

36. In opposing the winding up of Freerider, Mr Le Comte contends that it is Mr Heinen who is responsible for the current break down in relations and that he does not come to Court with clean hands because any breakdown in trust and confidence between them is due to his own misconduct and his failure to comply with the agreements between them. Furthermore, he argues, Mr Heinen could not have had or have any legitimate expectations which have been thwarted because he expressly agreed the Mr Le Comte would have the final say with regard to the management of Freerider and its business strategy. He contends that there would be no deadlock if Mr Heinen complied with the contractual provisions of the First Shareholders' Agreement. Mr Le Comte also says that if there is deadlock it can be solved by the appointment of a third director and he has purported to appoint one pursuant to his right to do so under the First Shareholders' Agreement. Mr Le Comte accordingly argues that it would be unjust and inequitable to wind up Freerider. . ."

The judge noted that the Investor Group supported the petition.

26. At paragraph 41 of his judgment the judge referred to Mr Le Comte's submission that the petition should be struck out under the court's inherent jurisdiction on the grounds (i) that it was bound to fail (because Mr Heinen could not make good his allegations) and (ii) that Mr Heinen had an alternative remedy which it was unreasonable for him not to pursue. The judge noted that, in the latter context, Mr Le Comte relied on the decision of this Court in *Camulos Partners Offshore Limited v Kathrein & Co* (unreported, CICA 11/2009, 18 March 2010).

27. The judge referred, also, to the alternative remedy sought by Mr Le Comte under section 95(3)(d) of the Companies Law (2009 Revision). The section is in these terms, so far as material:

> "95(3) If a petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to winding up, namely:
>
> . . .
>
> (d) an order providing for the purchase of the shares of any members of the company by other members of the company or by the company itself . . ."

As the judge observed, at paragraph 36 of his judgment:

> " . . . In the event that the Court nonetheless concludes that it would be just and equitable to wind up Freerider, Mr Le Comte seeks as an alternative an order providing for the sale to him of Mr Heinen's shares in Freerider pursuant to Section 95(3)(d) of the Law, at a price to be determined by an expert. Mr Heinen strongly opposes that alternative and contends that if any order is to be made providing for the purchase of the shares in Freerider it should be an order for his purchase of Mr Le Comte's shares, although the primary relief he seeks is a winding up."

The judge's reasons for making an order that the Company be wound up.

28. Paragraph 60 of the judgment contains a summary of the judge's reasons for making a winding-up order. In setting out that paragraph below, I have (for convenience) divided the text into four parts:

> "60. . . . [A] I am quite satisfied that, in the circumstances Freerider, as are the other entities within the structure, is a quasi-partnership company and that the quasi-partnership . . . between the quasi-partners, Mr Heinen and Mr Le Comte has irretrievably broken down. Furthermore, I am also satisfied that the petitioner, Mr Heinen, was not the cause, and certainly not the sole cause, of the break down and the consequent deadlock which exists. I have already expressed my views on the relevance and extent of the legal rights which Mr Le Comte purports to assert pursuant to the First Shareholders Agreement but whether or not I am right about this, in my judgment this is nonetheless very much a case in which the whole circumstances warrant the Court subjecting those purported legal rights to equitable considerations and I consider it entirely appropriate to do that. In my opinion it is just and equitable to wind up Freerider.

> [B] I should add that I am also satisfied that the members of Freerider have justifiably lost confidence in Mr Le Comte based on a lack of probity in his conduct of the affairs of the business, including Freerider, and that this is a further reason for winding up Freerider on the just and equitable ground.
>
> [C] Finally, for the reasons also mentioned above, I am of the view that the underlying purpose for which Freerider was incorporated is no longer capable of achievement and that it is no longer possible to carry on its business in accordance with the reasonable expectations of its participating shareholders as to its object and purpose. Accordingly, in my opinion, and adopting the traditional language, the substratum of Freerider has gone and this too is a ground of winding up the company on the just and equitable ground.
>
> [D] It follows from those conclusions that Mr Le Comte's application for the petition to be struck out is refused."

The judge recorded that an application by Mr Le Comte to have the petition stayed pending the outcome of the proceedings in New York was not pursued.

29. It can be seen that the judge accepted that it was appropriate to make a winding up order on each of the three grounds which – as he had identified in paragraph 35 of his judgment – were advanced on behalf of the petitioner, Mr Heinen. I turn, now, to examine, in more detail, the reasons which led the judge to conclude that he should make a winding up order in this case.

Irretrievable breakdown of mutual trust and confidence

30. The judge set out (at paragraph 37 of his judgment) what he described as "the well known and frequently cited passages" from the speeches of Lord Wilberforce and Lord Cross of Chelsea in *In re Westbourne Galleries Limited, Ebrahimi v Westbourne Galleries Limited and others* [1973] AC 360, 379B-380B, 383H-384B, 387F-H. He referred, also, to observations of Lord Millett in *CVC/Opportunities Equity Partners Limited and another v Demarco Almeida* [2002] CILR 77, 88. He expressed the view that it was clear from those authorities that the business relationship between Mr Heinen and Mr Le

Comte, formed in 2003, "undoubtedly was established on the basis of a personal relationship of mutual trust and confidence and, as structured by Mr Le Comte, including Freerider as an integral part, amounted to a quasi-partnership". He said that he did not understand it to be seriously contended on behalf of Mr Le Comte that the Company was not a quasi-partnership in the sense explained in the authorities: indeed, as the judge observed (at paragraph 44 of his judgment), "it seems to me to be almost a classic case".

31. The judge went on to say this:

> "44. . . . Furthermore, there was a single business venture between them which was reflected in the structure created by Mr Le Comte of which Freerider is an integral part together with EEU, EWW, EMS and ENA. The whole business is related to Mr Heinen's invention, TheWheel, and its continuing development and commercial exploitation along with his other technologies. In determining whether it is just and equitable to wind up Freerider consideration should, in my opinion, be given to all the surrounding circumstances. It would be wholly artificial and inappropriate to view Freerider in isolation and not to consider the position . . . in the context and circumstances of the whole business venture of which it is part, including, indeed, the other ongoing issues and disputes concerning other entities which are also integral parts of the whole quasi-partnership structure. . . ."

32. As I have said, the judge was satisfied that the relationship between Mr Heinen and Mr Le Comte "when the quasi-partnership began" was one of mutual trust and confidence. He was also satisfied that that relationship of trust and confidence had broken down irretrievably "both at a business level and at a personal level". He said this:

> "45. . . . Since June 2007 they have been, and in most issues continue to be, involved in hostile litigation, either directly or indirectly, against each other in four different jurisdictions. They are even in dispute in relation to the shareholders in Freerider. There is litigation between entities in which they both have beneficial interests and about agreements between entities in which they also both have beneficial interests. They are in dispute concerning the shareholders' agreements between them as well as about a number of other issues relating to the business venture between them. Whatever the rights and wrongs there is, in my opinion, no doubt that in practical terms the previous

> relationship of mutual trust and confidence which was the foundation on which their business relationship was based has irretrievably broken down. . . ."

The judge rejected Mr Le Comte's contention that the breakdown was not necessarily irretrievable. He said this:

> "45. . . . It may be that he [Mr le Comte] was suggesting that based on his view that there would be no problem if Mr Heinen accepted and complied with the strict letter of the shareholders' agreement: if he was suggesting it for any other reason, in my opinion that is unrealistic. In the circumstances here I see no probability that the relationship may recover. . . ."

33. The judge then turned to the submission, advanced on behalf of Mr Le Comte, that "the superimposition of equitable principles on legal rights is only justified where the petitioning creditor has a 'legitimate expectation' which is not being met". At paragraph 40 of his judgment he had set out passages from the judgment of Justice Smellie (as he then was) in *RBC v Thai Asia Fund Limited* [1996] CILR 9, 24 (lines 20-30), 25 (lines 16-21, 31-36), 26 (lines 26-32) to which he had been referred. He explained that it was Mr Le Comte's position that the matters of which Mr Heinen complained were matters governed by the First Shareholders' Agreement; so that he could have no "legitimate expectation" – the phrase used by Lord Justice Hoffmann in *In Re Saul D Harrison & Sons Plc* [1994] BCC 490 and adopted by Justice Smellie in *RBC v Thai Asia Fund* in the passage cited (*ibid, 25,* lines 31-36) - that Mr Le Comte would not act on behalf of the Company in accordance with his right under clause 1(2) of that agreement. He went on to say this:

> 46. . . . it was strenuously argued on behalf of Mr Le Comte that the relationship between him and Mr Heinen, as far as Freerider is concerned, is governed by the First Shareholders' Agreement. He says that the dispute between them is essentially a dispute concerning the management of the company and in particular the business strategies of the company, which, he says, is clearly a matter on which he solely is entitled to make the final decisions pursuant to Section 1(2) of the First Shareholders' Agreement. He argues that Mr Heinen can have no 'legitimate expectation' that he, rather than Mr le Comte, should have the ultimate right to determine Freerider's management issues of a non-technical nature, including the management structure and

> business strategies. He contends that Mr Heinen was and can be under no illusion about this because it is what they agreed at the start of their business relationship having regard to their respective skills, knowledge and experience and that he willingly agreed to this arrangement, which is simply reflected in the provisions of the First Shareholders' Agreement. It is submitted on behalf of Mr Le Comte that there is or should be no deadlock if Mr Heinen abided by the contractual provisions of the First Shareholders' Agreement which they entered into in July 2003. . . ."

34. The judge observed (at paragraph 47 of his judgment) that Mr Le Comte's contention, in relation to 'legitimate expectation', had an initial attraction. But he rejected that contention for the reasons which he set out in paragraphs 47 to 49 of his judgment. In the course of those paragraphs the judge made findings of fact upon which, *prima facie*, Mr Heinen is entitled to rely in this Court.

35. The first of the judge's reasons for rejecting Mr Le Comte's contention that Mr Heinen could have no "legitimate expectation" that he (Mr Le Comte) would not act in accordance with his right under clause 1(2) of the First Shareholders' Agreement was that he found "no reliable evidence that Mr Heinen did not wish to be involved at all in the conduct and management of the business of the quasi-partnership". Indeed, as the judge observed, his assessment of the evidence was quite to the contrary. He said this:

> "47. . . . Although, as I have said, at least in the first year or so, Mr Heinen's [principal] focus was technological rather than the corporate niceties which he trusted Mr Le Comte to deal with in the interests of both of them, it is, in my view, quite clear that Mr Heinen was nonetheless very interested in the promotion of TheWheel and, subsequently, his other inventions, and in establishing relations and working with actual and potential third party customers who had or may have had an interest in using his technology in one way or another. In fact the evidence is, as I have already stated, that for the first year or so Mr Le Comte and Mr Heinen discussed all aspects of the business together on a very frequent basis and there was no suggestion of Mr Le Comte then that certain areas of management were for him alone to decide. Mr Heinen was clearly heavily involved in the whole management and conduct of the business, including business strategy, and it was and is clear that he wanted and expected to be. My clear impression from Mr Heinen's evidence is that Mr

> Heinen had no expectation that Mr Le Comte would or could impose on him or EEU an entirely different business strategy without his agreement. It was, as far as Mr Heinen was concerned, indeed a partnership between him and Mr Le Comte and he anticipated and expected that it would operate as a partnership, as it in fact did for the first year or so. . . ."

After holding that there was no evidence that Mr Heinen had had "any significant direct input into the relatively complicated (to a layman) wording of the specific provisions [of the First Shareholders' Agreement]" – which, as he pointed out, was drafted by New York lawyers instructed by Mr Le Comte - the judge went on to say that:

> 47. . . . Notwithstanding his execution of the First Shareholders Agreement, I am not persuaded, having seen and heard Mr Heinen, that in 2003, when the structure was set up and the various agreements produced in relation to the business venture he was going into with his best friend, who he said he trusted implicitly, he had no expectation that he would be closely involved in all aspects of the conduct of the business, whether or not he was known as Chief Technology Officer and whatever the legalistic wording of the First Shareholders Agreement may have said."

36. The second of the judge's reasons for rejecting Mr Le Comte's contention that Mr Heinen had no "legitimate expectation" that he would not act in accordance with his rights under clause 1(2) of the First Shareholders' Agreement was that the difference of opinion between them as to the way in which the business should be carried on – a difference of opinion which, as the judge observed, was accepted by both to have been accurately summarised in the report of Mr van Hees to the Enterprise Chamber of the Amsterdam Court of Appeal – was as to matters which did fall entirely within Mr Le Comte's sole discretion under that clause. The judge said this:

> "48. . . . As I have already explained, a principal reason for the dispute between them was Mr Le Comte's concern about Mr Heinen's/EEU's technological ability and about Mr Heinen's continuing to enter into commercial projects involving his technology with third parties and the financial consequences, as Mr Le Comte saw it, of his doing so. Although, I do not think for present purposes it is necessary to analyze this in detail, it does [not] seem to me that the subject matter of this particular disagreement between Mr Le Comte

and Mr Heinen falls within the issues with regard to which each of them had sole discretion pursuant to Section 1(1) and (2) of the First Shareholders Agreement. In my view, the submission that the difference of opinion between Mr Heinen and Mr Le Comte concerned matters which fell exclusively within the sole discretion of Mr Le Comte pursuant to the First Shareholders Agreement is an over simplification and not made out."

37. The judge went on to say that, even if contrary to his view of the evidence, Mr Le Comte was right that the sole cause of the breakdown was Mr Heinen's failure to abide by the contractual provisions of the First Shareholders' Agreement, he was of opinion that, "on the facts", it was not "inevitably Mr Le Comte's legal right to insist that his views on the issue between them must prevail and that Mr Heinen was contractually bound to accept that". In developing that third reason for rejecting Mr Le Comte's contention that Mr Heinen had no "legitimate expectation" that he would not act in accordance with his legal rights under the First Shareholders' Agreement, the judge referred again to the observations of Lord Wilberforce in the *Westbourne Galleries* case (*ibid,* 374H, 379D). He said this:

> "49. . . . [That] means, in the context of the present case, that even if, contrary to my view above, Mr Le Comte is right about the applicability of his legal rights under the First Shareholders Agreement in relation to what he contends is the issue between him and Mr Heinen, the Court may, in the exercise of its equitable jurisdiction, nonetheless determine that in all the circumstances Mr Le Comte's insistence on such legal rights is unjust or inequitable."

He went on to say that nothing in the judgment in *RBC v Thai Asia Fund (supra)* – upon which counsel for Mr Le Comte had placed considerable emphasis – was inconsistent with that view of the law: "each case will obviously depend entirely upon its own circumstances". He concluded:

> "49. . . . In my opinion, not only is the argument in this regard by Mr Le Comte not well founded on the facts, it also amounts to an attempt to restrict or limit the broad general language of section 92(e) of the Law and is not in accordance with the language of the subsection or with well established authority."

Mr Le Comte's lack of probity in the conduct of the Company's affairs

38. At paragraph 42 of his judgment the judge had referred to the speech of Lord Shaw of Dunfermline, delivering the opinion of the Privy Council in *Loch v John Blackwood* [1924] AC 783, 788, as authority for the proposition that the court could wind up a company on the just and equitable ground if satisfied that the members had lost confidence in its management as a result of "a lack of probity in the conduct of the company's affairs". He observed that it was Mr Heinen's case that he, and the Investor Group, had, with justification entirely lost confidence in Mr Le Comte as a result of what they (and others) reasonably considered to be a serious lack of probity in his conduct of the Company's management. Mr Heinen's allegations, supported by the evidence of Mr Van der Sluis (on behalf of the Investor Group) were met with counter-allegations on the part of Mr Le Comte. It was his case that it was Mr Heinen who was responsible for the breakdown in the relationship; and that Mr Heinen should be denied the equitable remedy which he sought because he did not come to the court "with clean hands".

39. As I have said, on the basis of hearing and seeing them give their evidence in the course of the trial, the judge made his assessment of Mr Heinen and of Mr Le Comte: he set out his findings at paragraphs 51 and 52 of his judgment. At paragraphs 53 to 56 he set out and examined the allegations and counter-allegations made by the protagonists. He observed, at paragraph 53, that the real cause of the breakdown in the relationship was "Mr Le Comte's increasing loss of faith in Mr Heinen's technological abilities and in TheWheel itself". He found that, in the course of the telephone conversation on 15 August 2006 (to which I have already referred) Mr Le Comte told Mr Heinen "that he was effectively withdrawing from management of the e-Traction Group, leaving Mr Heinen with no alternative but to manage EEU himself".

40. The judge placed considerable reliance on the evidence of Mr Van der Ven, who was appointed as the interim director of EEU in October 2007; and on the report of Mr van Hees, the independent lawyer appointed by the Enterprise Chamber to conduct an investigation into the affairs of EEU. He said this:

> "54. . . . Mr Van der Ven, who clearly has significant experience and qualifications in respect of company management matters, was specifically appointed by the Enterprise Chamber as an interim director and his independence and objectivity as such are not, in my judgment, in doubt. He made considerable genuine and bona fide efforts to resolve the disputes between Mr Heinen and Mr Le Comte and to deal with the financial problems of EEU. Entirely independently he concluded that Mr Le Comte did not want to resolve the problems and was only interested in his own interests and objectives.
>
> . . .
>
> Although he did not give evidence, the report of Mr van Hees to the Enterprise Chamber was made available at the hearing and his conclusion that Mr Le Comte was guilty of a lack of probity and mismanagement of EEU was obviously accepted by the Enterprise Chamber. Mr Le Comte challenged this report as being only preliminary but clearly it was sufficient in the view of the Enterprise Chamber to enable them to form a view and make a decision to permanently remove Mr Le Comte as a director of EEU.

41. The judge placed reliance, also, on the finding of mismanagement by the Enterprise Chamber. He said this:

> "55. It was submitted on behalf of Mr Le Comte that the finding by the Enterprise Chamber of mismanagement by Mr Le Comte is irrelevant because it related to EEU and not to Freerider. However, I have already expressed the opinion that in considering whether it is just and equitable to wind up Freerider I should look at the realities and the whole circumstances and context. Both Freerider and EEU are plainly each parts of the group structure established by Mr Le Comte to carry out a single business venture. In my view the fact that Mr Le Comte has been found by a court to have been guilty of mismanagement of what is in fact probably the most important and significant company within the group is undoubtedly relevant in the consideration of whether there is justification for a loss of confidence in Mr Le Comte's conduct generally, including his management of Freerider. I see no reason not to accept and proceed upon the basis of the report of Mr van Hees and the consequent decision of the Enterprise Chamber."

42. Finally in this context, the judge placed reliance on the evidence of Mr Arend Van der Sluis, a member of the Investor Group. He observed that, by February 2006, the Investor Group's investment in the joint venture business (through

its holding of Class B and Class C Shares in the Company) had reached approximately €1.6 million. He went on to say this:

> 56. . . . Mr Van der Sluis confirmed the Investor Group's considerable anxiety about the position and particularly their serious concerns about Mr Le Comte's insistence that no further funding of EEU would be provided by Freerider or himself, with the result that EEU was in a serious financial situation. He also addressed the concerns of the Investor Group that Mr Le Comte was considered by all concerned to be an impediment to EEU doing business with third parties, many of whom refused to deal with Mr Le Comte. I had no reason to doubt the credibility of Mr Van der Sluis' evidence, which was not, in my view, challenged in any material way."

Loss of substratum

43. The judge was satisfied on the evidence (as he said, at paragraph 57 of his judgment) that "the whole purpose and rationale for the incorporation of Freerider was . . . to enable royalty payments made in respect of the licensing of the intellectual property rights in TheWheel and associated technology to third parties to be made to an entity in a tax free jurisdiction in order to avoid or at least mitigate the Dutch tax which would be payable in respect of such payments if they were made in the Netherlands". He held, also, (at paragraph 58) that it was clear that "the tax benefit objective" of incorporating the Company could not be achieved "since the Dutch tax authorities have clearly determined that for Dutch tax purposes Freerider is considered by them to be resident in the Netherlands and accordingly Dutch tax is payable on any royalties or other income paid to Freerider". He had referred, at paragraph 43 of his judgment, to the observation of Justice Andrew Jones QC in *In re Belmont Asset Based Lending Ltd* (unreported, FSD 15/2009, 21 January 2010) that ". . . it can be said that it is just and equitable to make a winding up order . . . if the circumstances are such that it has become impractical, if not actually impossible, to carry on [the company's] business in accordance with the reasonable anticipations of its participating shareholders"; and had expressed the view that, although that observation was made in the context of a consideration of the circumstances in which it was just and equitable to wind up a company carrying on business as an open ended mutual fund, he was not

convinced that it should, necessarily be confined to companies carrying on business of that nature.

44. He went on to say this:

> "57. . . . It was argued on behalf of Mr Le Comte that since Freerider is, pursuant to the APA in particular, the owner of valuable assets, which, if EEU continues, as alleged, to breach its obligations, Freerider would be free to exploit with other third parties . . . Freerider is perfectly viable with legitimate business interests to pursue and it was pointed out that the objectives for which Freerider was formed as set out in its memorandum of association are unrestricted. Accordingly, it was argued, the tax ruling in the Netherlands is irrelevant to Freerider's substratum which has not been lost or failed. I have already said that I can see no good reason not to adopt the test proposed by Jones J in the *Belmont Asset Based Lending Ltd* case (ibid), namely that if the circumstances are such that it is impractical, if not actually impossible, for the company to carry on its business in accordance with the reasonable expectations of its participating shareholders, it will be just and equitable for it to be wound up. The older authorities indicate that the court may wind up a company on the just and equitable ground if the 'substratum' of the company has been lost, meaning if the underlying purpose for which the company was incorporated is incapable of achievement. I am satisfied that both of those tests are met in the present case. In my view the sole function of Freerider was to receive and hold [royalty] payments for tax reasons, which reasons are not valid. The company will not achieve its purpose, which is incapable of achievement in the light of the ruling of the Dutch revenue authorities as a result of which it is clear that Dutch tax will in fact be payable on Freerider's income receipts. Furthermore, it is indeed impossible, to carry on the business of Freerider in accordance with the reasonable expectation of Mr Heinen and Mr Le Comte at the time the company was incorporated, namely the expectation that Dutch tax on royalty payments would thereby be avoided. Even if Freerider were now to carry on business as suggested on behalf of Mr Le Comte, the objective of the company's existence would still be incapable of being achieved and there would be no justification for Freerider's continued existence simply in order to carry on that business."

The refusal to strike out the petition

45. Having reached the conclusion that Mr Heinen had made good his allegations, the judge was bound to refuse to strike out the petition on the first of the grounds advanced on behalf of Mr Le Comte. He said so in paragraph 60 of

his judgment: in the sentence which I have set out earlier as part (D) of that paragraph. He did not address, in paragraph 60, the second of the grounds for strike out advanced on behalf of Mr Le Comte: that the petition should be struck out under the inherent jurisdiction of the court because Mr Heinen had an alternative remedy in respect of his complaints about the shareholdings in Freerider which it was unreasonable for him to choose not to pursue.

46. The judge had referred, earlier in his judgment (at paragraph 10), to the dispute between Mr Le Comte and Mr Heinen on the question whether the true holder of those shares in the Company not held by Mr Le Comte or the Investor Group was Mr Heinen or his company, AHAB. At paragraph 41 of his judgment the judge explained that:

> "Mr Le Comte's argument was that the only possible live issue, if there is one at all, between him and Mr Heinen is the question of whether the shares in Freerider beneficially owned by Mr Heinen should be registered in his individual name or the name of his company AHAB. That issue could and should be resolved by an action for rectification of the register and, so it is said, it is unreasonable for Mr Heinen to choose not to pursue that alternative remedy. The response to that on behalf of Mr Heinen is that the dispute concerning the name in which the shares should be registered is not the basis for Mr Heinen's petition but is simply evidence that the relationship between him and Mr Le Comte has broken down and of the loss of mutual trust and confidence."

It is, I think, implicit in the order which he made that the judge accepted that that response was based on a correct analysis of the position.

The judge's reasons for refusing an alternative remedy under section 95(3) of the Companies Law

47. As I have said, the judge had referred, at paragraph 36 of his judgment, to Mr Le Comte's contention that, if the court were to conclude that it would otherwise be just and equitable to wind up the Company, it should – as an alternative remedy – make an order, pursuant to Section 95(3)(d) of the Law, providing for the sale to him of Mr Heinen's shares in the Company at a price to be determined by an expert.

48. The judge addressed that contention at paragraphs 63 and 64 of his judgment. He said this:

> "63. Mr Le Comte also contends, in the alternative, that rather than wind up Freerider the Court should make an order providing for Mr Heinen to sell his shares in the company to Mr Le Comte. It was submitted on his behalf that it would be for Mr Heinen to sell his shares to Mr Le Comte because Mr Heinen is the petitioning shareholder and the complainant with the alleged grievance and that the practice in England is for the majority to buy out the minority or at least for the petitioning shareholder to be bought out. In the present case there is, of course, no majority, since the voting shares in Freerider are held equally between Mr Le Comte and Mr Heinen. However, the provisions of section 95(3)(d) of the Law give the Court a very broad jurisdiction, as an alternative to a winding up, to make an order *'providing for the purchase of the shares of any members of the company by other members . . .'* [My emphasis]. It seems to me that the wording of the provision is sufficiently wide to enable the Court to provide for the purchase of the shares of or by any member of the company, whether or not a majority or minority shareholder or whether or not a shareholder is a petitioner or a respondent in the winding up proceedings, as the Court may consider appropriate in the circumstances. I was anyway referred to *In re Copeland v Craddock Ltd* [1997] BCC 294 in which the possibility of the shareholders opposing a winding up petition being ordered to sell their shares to the petitioner was acknowledged by the English Court of Appeal as being a course open to the Court: (see Dillon LJ at 297).
>
> 64. The proposal that Mr Heinen should be ordered to sell his shares to Mr Le Comte was strongly resisted on behalf of Mr Heinen. It was emphasised that the whole business of Freerider and the quasi-partnership relates to Mr Heinen's invention and that 'all' Mr Le Comte had brought to the business was money (albeit a significant amount) which was easily replaceable. It was pointed out that previous negotiations relating to a possible sale by Mr Le Comte of his shares in the business made it clear that the only reason why Mr Le Comte had declined to sell his shares was because the price offered to him was not sufficient. There was no objection by him to the principle of being bought out. A fair and reasonable price for Mr Le Comte's stake in Freerider could easily be ascertained by an appropriate valuation expert and, in the absence of agreement as to price between the parties, that would be the usual course for the Court to take in respect of an order for sale of a party's shares. It was also submitted that to order Mr Heinen to sell his shares to Mr Le Comte would be very

> unfair to Mr Heinen as the creator of the very subject matter of the business, namely, TheWheel and the other technology which he has developed. Furthermore, and of considerable significance in my opinion, if Mr Heinen was compelled to sell his shares in Freerider to Mr Le Comte with the consequence with the consequence that Freerider would effectively be wholly owned and controlled by Mr Le Comte, it would not resolve the problems which in my view, make it just and equitable to wind up Freerider; both parties would remain actively involved in the business. In any event, as Mr Heinen said in evidence, there is no intention to deprive Mr Le Comte of his financial investment. He will anyway remain a beneficiary of the commercial exploitation of TheWheel and associated technology through his limited partnership in EWW which is the sole shareholder of EEU."

49. At paragraph 62 of his judgment the judge explained that, on 16 April 2010 (very shortly before the hearing of the petition), Mr Le Comte purported to appoint an additional director of the Company. Mr Heinen challenged that appointment: his position was that, if the court took the view that an additional director should be appointed as an alternative to the making of a winding up order, pursuant to section 95(3) of the Law, then "such a director should be appointed by the Court and not Mr Le Comte who contends that he would be able to remove him or appoint other directors pursuant to his alleged rights under the First Shareholders Agreement". The judge disposed of the point shortly. He said this:

> "62 . . . In my opinion, the appointment of a third director would not, having regard to all the circumstances, resolve all the many problems arising as a result of the break down of the quasi-partnership between Mr Heinen and Mr Le Comte, who I consider should no longer be in business together."

50. It was for those reasons that the judge concluded (at paragraph 65 of his judgment) that neither of the alternative remedies proposed by Mr Le Comte – by which, I think, he must be taken to have meant both the proposed appointment of a third director and the proposed share purchase - was appropriate. He declined to make the orders, alternative to winding up, which Mr Le Comte sought. He said this:

"65 I am therefore of the opinion that it is just and equitable that Freerider should be wound up and I so ordered."

The grounds of appeal

51. The grounds of appeal are set out (in the amended memorandum filed on behalf of Mr Le Comte on 14 July 2010) at length and under seven heads: (i) the Shareholders' Agreement; (ii) the Commercial Agreements; (iii) the appellant's financial contribution to the Company and the financial condition of the Company; (iv) events in 2005-2006; (v) events in 2007-2008; (vi) the Dutch and US litigation; and (vii) alternative remedies and loss of substratum. It is difficult to summarise the grounds of appeal succinctly; and – despite their prolixity - it is, I think, necessary to set them out at some length. It can be seen that there is substantial repetition.

52. Under the first of those seven heads (the Shareholders' Agreement) it is said:

(1) that the judge failed "to properly consider and/or give appropriate weight and or correctly interpret" the First Shareholders' Agreement;

(2) that the judge failed to give proper weight to the facts (a) that Mr Heinen had consistently ignored his obligations under the First Shareholders' Agreement and had taken steps to undermine the effect and intention of that agreement in order to obtain advantages (including control of EEU) and (b) that, if Mr Heinen had adhered to his obligations under that agreement, the relationship between Mr Heinen and Mr Le Comte would not have broken down;

(3) that the judge failed to give any weight to the facts (a) that Mr Le Comte had merely sought to exercise his contractual rights under the First Shareholders' Agreement, (b) that the complaints in the petition as to his conduct are "irrelevant and/or untrue" and, even if true, do not justify Mr Heinen's attempts to resile from his obligations under that agreement or provide sufficient grounds for winding-up the Company on just and equitable grounds;

(4) that the judge failed to give sufficient weight to the facts (a) that Mr Heinen had through his actions since 2006 deliberately sought to

undermine the First Shareholders' Agreement and to undo the effect of the various commercial agreements between the Company and EEU as a result and (b) "has consistently placed his own interests and the interests of EEU before the interests of the Company";

(5) that, in so far as the judge held that both Mr Heinen and Mr Le Comte were involved in discussing matters in the early years of the Company's existence, he was wrong to hold that Mr Le Comte could not or was not entitled to request Mr Heinen to adhere to Mr Le Comte's preferred business strategy for the Company in the event of disagreement;

(6) that the judge erred in holding that, on the evidence, Mr Heinen could disregard the views of Mr Le Comte in relation to matters of business strategy; and

(7) that the judge erred, if and in so far as he gave weight to the contention that Mr Heinen did not receive separate advice in 2003 in relation to the First Shareholders' Agreement (or other agreements), because that contention was irrelevant.

53. Under the second head (the Commercial Agreements) it is said:

(1) that the judge failed to give appropriate weight to the APA, the TASA or the IPLA; in particular that he should have held that Mr Heinen's allegation that Mr Le Comte agreed that no royalty payments would be payable by EEU to the Company pursuant to the IPLA "was patently false" and "simply untrue and completely unrealistic";

(2) that the judge failed to give appropriate weight to the fact that Mr Heinen's only contribution to the Company was to cause the assets controlled by him (or by AHAB) prior to April 2003 to be transferred to the Company and to EWW pursuant to the TASA, the APA and the sales transaction between AHAB and EWW;

(3) that the judge failed to give appropriate weight to the fact that Mr Heinen had sought to cause EEU to terminate the commercial agreements against the interests of the Company "and its majority owned interest in EWW"; and

(4) that the judge failed to give sufficient weight to the fact that Mr Heinen's actions in relation to the IPLA, the TASA and the APA are (a) in further breach of the First Shareholders' Agreement, (b) in breach of his duties as a director and officer of the Company and (c) "a blatant attempt" to deny the Company and Mr Le Comte the benefits "'purchased' by the Company under the IPLA, TASA and APA and its majority participation in EWW".

54. Under the third head (the appellant's financial contribution to the Company and the financial condition of the Company) it is said:

(1) that the judge failed to appreciate or give sufficient weight to the actual financial condition of the Company; in particular he failed to appreciate that "the €400,000 of unsecured loans made by [Mr Le Comte] to [Mr Heinen] in 2002-2003 were by the agreement dated April 10th 2003 between the parties considered repaid as part of a transaction by which [Mr Le Comte] provided an additional payment of the equivalent of €600,000 to purchase a 50% stake in EEU, A&J Partners BV and TheWheel BV effective April 1st 2003, which included all Intellectual Property generated up to that point";

(2) that the judge failed to give sufficient weight to the evidence that "the Company from its inception was entirely dependent upon funding derived from the rights it had acquired in the Intellectual Property, EWW and its subsidiaries and in the absence thereof from outside sources especially from [Mr Le Comte] personally as EEU under the day to day management of [Mr Heinen] remained unable to meet its technical and financial commitments to the Company";

(3) that the judge failed to give sufficient weight to the facts (a) that Mr Le Comte had continued to provide funding to the Company to enable it to meet its obligations to its professional advisers and service providers to defend and pursue the interests of the Company and (b) that, in addition to the sums totalling approximately €1 million used for the purchase of his shareholding in the Company and the sums totalling approximately €1.3 million paid for the period to late 2005, Mr Le

Comte personally advanced further amounts by way of loan to the Company exceeding €1.7 million;

(4) that the judge failed to give sufficient weight to the facts (a) that Mr Heinen had "no tangible interest in the winding up of the Company and (b) that, although the Company is potentially valuable, it currently has insufficient cash or other marketable assets to meet its obligations to creditors and the prospect of a payment by the Company to its shareholders, including Mr Heinen, is extremely remote; and

(5) that the judge failed to give any weight (a) to the views of Mr Le Comte as the largest unsecured creditor of the Company that he did not, "in his capacity as shareholder, director, officer, employee and creditor of the Company" support a winding up of the Company and (b) that no other creditor of the Company can be shown to have supported the petition.

55. Under the fourth head (events in 2005-2006) it is said that the judge failed to give sufficient weight to "the unprovoked and purposed takeover of EEU" in August 2006 by Mr Heinen or to the evidence of Mr Le Comte in relation to events from mid 2005 until August 2006; in particular, the judge should have concluded that Mr Heinen's e-mail of 16 August 2006 "was a clear statement of intent by [Mr Heinen] to ignore his contractual obligations under the First Shareholders Agreement and to deliberately cause harm to [Mr Le Comte's] interests in the Company". By way of elaboration of that ground, it is said that:

> "The statement by [Mr Heinen] that [Mr Le Comte] was 'abandoning him' and that this justified his e-mail of 16th August 2006 and his subsequent actions is simply untrue and is contradicted by the evidence which shows that from mid 2005 [Mr Le Comte] had been using all reasonable means to encourage [Mr Heinen] to adopt the approach of [Mr Le Comte] in relation to the business of the Company and that it was [Mr Heinen's] decision to ignore the repeated requests of [Mr Le Comte] in relation to the future business strategy in blatant breach of the First Shareholders' Agreement which caused the problem between [Mr Heinen] and [Mr Le Comte] to develop."

56. Under the fifth head (events in 2007-2008) it is said:

(1) that the judge failed to give any or any sufficient weight to the facts (a) that Mr Le Comte had no choice but to take steps in Luxembourg in an attempt to regain influence over EEU through the Shareholders' Agreement to which EMS was a party and (b) that the steps taken by him were entirely within his contractual rights and very much in the interests of the Company as the majority owner of EWW; and failed to give any or any sufficient weight to the fact that the actions of Mr Heinen were in breach of his fiduciary duties as an officer and director of both the Company and EMS/EWW and "caused each of those entities grave financial harm while deliberately impeding their ability to function as intended";

(2) that the judge failed to give any or any sufficient weight to Mr Le Comte's evidence as to the reason why proceedings were commenced in July 2007 by the Company against EEU in the District Court at Zutphen; and, in particular, failed to give weight to Mr Le Comte's evidence that Mr Heinen had been shown "to misuse and/or misappropriate funds put at his disposal by the Company and customers of EEU to pursue his personal objectives and benefits as opposed to funding the Company as he had previously promised";

(3) that the judge failed to give proper weight to the evidence before the Enterprise Chamber of the Amsterdam Court of Appeal (a) that it had been Mr Heinen and not Mr Le Comte "who has acted against the interest of the Company and its majority owned EWW in seeking to seize unilateral control over EEU thus depriving both entities of their right to unencumbered enjoyment of the contractual and ownership rights held by each of them" and (b) that Mr Heinen had shared confidential information with parties adverse to the Company to further his personal interests in the proceedings in the Enterprise Chamber;

(4) that, if the judge had properly weighed the evidence in relation to the proceedings in the Enterprise Chamber, he would have concluded that:

(a) Mr Heinen used those proceedings as a means to an end "which was to consolidate his control over EEU in breach of the First Shareholders Agreement";

(b) Mr Le Comte was unjustly criticised by Mr Van Hees, "whose inadequate and preliminary report was relied upon by the Enterprise Chamber", for taking steps in the interests of the Company;

(c) the proceedings before the Enterprise Chamber (in so far as relevant) show that Mr Heinen, and not Mr Le Comte, was responsible for the alleged breakdown "as he initiated those proceedings using the employees of EEU as camouflage to hide his involvement and true intentions which were planned well in advance of events in June and July 2007" referred to by the judge in paragraphs 23 and 24 of his judgment;

(d) the steps taken by Mr Le Comte in June 2007 in Luxembourg and in July 2007 in The Netherlands were justified and within his rights under the First Shareholders' Agreement;

(5) that the judge failed to give any or any sufficient weight (a) to the unilateral termination, on 31 March 2008, of the APA, the TASA and the IPLA by Mr Heinen on behalf of EEU and (b) to the fact that Mr Heinen, as a director and officer of the Company, had argued that termination of those commercial agreements would be in the interests of the Company and had actively sought to impede the rights of the Company and EWW to participate in the proceedings in the Zutphen court, the proceedings in the Enterprise Chamber, the appeal before the Dutch Supreme Court, and the proceedings in Luxembourg and New York "by seeking the dismissal of their respective counsel in each of those jurisdictions";

(6) that the judge ought to have concluded that the unilateral termination of the commercial agreements was part of Mr Heinen's plan to undo those agreements against the interests of the Company and EWW and that Mr Le Comte and the Company "had no alternative but to

challenge the various wrongful acts of [Mr Heinen] by bringing proceedings at great expense to uphold the rights under APA, TASA and IPLA and the majority ownership rights in EWW";

(7) that the judge should have concluded that the New York proceedings were in the interests of the Company "as the only viable response to the unprovoked unilateral termination by [Mr Heinen] of the contracts (APA, TASA and IPLA) considered amongst the most valuable assets of the Company as it would result in a devastating and potentially terminal blow to its commercial and financial prospects";

(8) that the judge should have appreciated (in so far as he held otherwise) that it would have been pointless for Mr Le Comte to consult Mr Heinen before causing the Company to commence proceedings in New York against EEU "as [Mr Heinen] had made his intentions clear by causing EEU to try and terminate the APA, TASA and IPLA and in any event [Mr Heinen] through his actions was in a hopelessly conflicted position and could not be consulted by [Mr Le Comte] who was the only independent director of the Company; and

(9) that the judge failed to give any or any sufficient weight to Mr Heinen's admission (in the course of his evidence at the hearing of the petition) that "he did not consider himself bound by the First Shareholder Agreement or any other agreement for that matter as his only interest was formed by the success of his invention".

57. Under the sixth head (the Dutch and US litigation) it is said:

(1) that the judge ought to have concluded from the evidence (a) that the various actions in The Netherlands and New York were precipitated by Mr Heinen's attempts to extricate himself from the obligations imposed upon him by the First Shareholders' Agreement and to extricate EEU from its obligations under the commercial agreements and (b) that the steps taken by Mr Le Comte (in causing the Company to bring those actions) were within the powers given to him under the First Shareholders' Agreement and clearly in the best interests of the company and its creditors; and

(2) that the judge ought also to have concluded from the evidence (a) that Mr Heinen's complaints as to the conduct of Mr Le Comte "were of minor consequence and/or could be resolved by various alternative remedies none of which justified or required the winding up of the Company" and (b) that Mr Heinen was wholly or primarily to blame for the alleged breakdown by deliberately placing himself and/or EEU in positions which were adverse to the Company and EMS/EWW.

58. Under the seventh head (alternative remedies and loss of substratum) it is said:

(1) that the judge failed to conclude that Mr Heinen's complaints did not justify a winding up the Company; and that much of the petition concerned complaints about the share register for which there was an alternative remedy (proceedings for rectification of the register);

(2) that the judge failed to give any or any sufficient weight to Mr Heinen's statement (in his amended petition) that the appointment of a third director would resolve the deadlock which he alleged; and that his conclusion that the appointment of a third director would not resolve the problems was unjustified;

(3) that the judge gave too much weight to Mr Heinen's opposition to the proposal that, as an alternative to winding up, he should sell his shares in the Company to Mr Le Comte; and that the judge should have appointed an independent valuer to assess the value (if any) of Mr Heinen's shares for that purpose;

(4) that the judge wrongly concluded that the substratum of the Company had been lost;

(5) that the judge should have concluded that Mr Heinen had himself taken steps to undermine the tax status of the Company by encouraging the Dutch tax authorities to declare the Company resident in the Netherlands; and failed to give any or any sufficient weight to the fact that the Company should have been represented by Mr Le Comte (rather than Mr Heinen) in discussions with the Dutch tax authorities; and

(6) that the judge failed to enquire as to the ability of the liquidators nominated by Mr Heinen to wind up the Company in circumstances where they had no funding in place and "no appetite to take any steps to deal with the issues which were being adequately dealt with by [Mr Le Comte] prior to the liquidation".

59. By way of summary it is said – under the head "conclusion" – that, based on the evidence and the law, the judge should have concluded that:

(1) Mr Heinen's actions had been the dominant or sole cause of the breakdown in the relationship between the parties.

(2) Mr Heinen had no legitimate interest which had been infringed by Mr Le Comte; and that the complaints made by Mr Heinen in the petition were without any or sufficient foundation.

(3) At most, the matters complained of by Mr Heinen would entitle him to an alternative remedy (such as rectification of the register of members of the Company) and, accordingly, the petition should have been struck out.

(4) There was no objective justification for the alleged lack of confidence in the probity or conduct of Mr Le Comte and Mr Le Comte was the only party acting in the interest of the Company and seeking to uphold the rights of the Company "at great personal effort and financial sacrifice".

(5) The substratum of the Company had not been lost "as the Company has rights under the IPLA to license its intellectual property to other parties on a global basis and not just EEU and the tax benefits provided to the Company by being domiciled in the Cayman Islands are still valid and of significant potential value to the Company and thereby its owners [and] current creditors".

(6) Mr Heinen should forthwith adhere to his contractual arrangements reflected in the First Shareholders' Agreement.

(7) The appointment of a third director (nominated by Mr Le Comte) "was more than sufficient to obviate any concerns Mr Heinen may have had".

(8) The judge's assessment of Mr Heinen (in paragraph 51 of his judgment) was not supported by the evidence. In amplification of that contention it is said that the judge should have concluded:

(a) that Mr Heinen was in desperate need of funding in 2002 to prevent the collapse of his business; and that no-one other than Mr Le Comte had been willing to come to his aid;

(b) that Mr Heinen had suggested that Mr Le Comte convert his existing personal loan of €400,000 into equity in the Company and provide further funding up to a value of €1million in return for a 50% interest in the Company;

(c) that Mr Heinen and his wife thought from the beginning that they had ceded too much to Mr Le Comte and regretted their loss of exclusive control over EEU (then SPI), TheWheel and other intellectual property transferred to the Company and/or EWW;

(d) that Mr Heinen was content to proceed and work with Mr Le Comte for at least two and a half years until he was asked by Mr Le Comte to adhere to a revised strategy which was deemed to have become required to justify further funding of the EEU activities and/or deficits; and that it was from that point onwards that Mr Heinen "chose deliberately to ignore his obligations under the First Shareholders' Agreement";

(e) that Mr Heinen deliberately planned steps to remove Mr Le Comte's control over EEU and EWW in 2006 and 2007; and

(f) that Mr Heinen deliberately planned a strategy to destroy the contractual rights of the Company under the APA, the IPLA and the TASA for his personal benefit and that of EEU in 2008; and that the presentation of the petition to wind up the Company is a continuation of that strategy.

(9) The judge's assessment of Mr Le Comte (in paragraph 52 of his judgement) was not supported by the evidence. In amplification of that contention it is said that the judge should have concluded:

(a) that there were sufficient valid reasons for action to be taken against EEU in July 2007 by way of pre-judgment attachment; and that the proceedings for payment of unpaid royalties and repayment of loans were properly brought against EEU in October 2007 and are likely to result in judgment in favour of the Company;

(b) that there were valid reasons for the proceedings taken by the Company in New York against EEU, Mr Heinen and the Investor Group and that in so doing Mr Le Comte has managed to preserve the APA, the TASA and the IPLA which Mr Heinen, through EEU, has unjustifiably sought to rescind or terminate;

(c) that the proceedings before the Enterprise Chamber of the Amsterdam Court "were entirely unsatisfactory and biased in favour of Dutch interests"; and that in any event "the seriously flawed opinion of the Enterprise Chamber . . . merely confirms that Mr Le Comte has first and foremost been acting in the interests of the Company at all material times"; and

(d) that Mr Le Comte has taken steps on behalf of the Company "which any objective director would and should have taken against EEU and [Mr Heinen] to prevent EEU and [Mr Heinen] from purposely destroying the value and prospects of the Company".

60. It can be seen that the grounds of appeal – extensive as they are – contain no challenge to the judge's findings: (i) that the Company was set up as one element in a joint venture founded on the mutual trust and confidence which then existed between Mr Heinen and Mr Le Comte and should be regarded as a quasi-partnership in the sense recognised in the authorities; (ii) that there has been an irretrievable breakdown in that former relationship of mutual trust and confidence; (iii) that the underlying cause of that breakdown was the difference of view as to the way in which the objective underlying the joint venture – the development and commercial exploitation of TheWheel and its

associated technology – should be achieved; and (iv) that, from October 2006 or thereabouts, Mr Heinen was entirely excluded by Mr Le Comte from the management of the Company and was provided with no copies of its accounts or other records.

61. Nor, as it seems to me, is there any challenge in the grounds of appeal to the judge's view (expressed at paragraph 44 of his judgment) that, in considering whether it was just and equitable to order the winding up of the Company "it would be wholly artificial and inappropriate to view Freerider in isolation and not to consider the position . . . in the context and circumstances of the whole business venture of which it is part".

The challenge to the judge's findings of fact

62. The grounds of appeal contain extensive challenge to the judge's findings of fact. In particular, it is said that the judge was wrong to prefer Mr Heinen's evidence to that of Mr Le Comte where they were in conflict; to acquit Mr Heinen of any deliberate attempt to seize control of the e-Traction Group following the telephone conversation of 15 August 2006; and to acquit Mr Heinen of wrongdoing in relation to his management of EEU. In my view there is no basis for that challenge. As I have said, the judge had the advantage of seeing Mr Heinen and Mr Le Comte give their evidence in the course of the hearing before him. He made his assessment of their credibility and expressed his views as to their motivation at paragraphs 51 and 52 of his judgment. He had the advantage, also, of hearing the evidence of Mr Van der Sluis and Mr Van der Ven. We were taken through the transcript of the proceedings in some detail. There was ample material on which the judge could reach the conclusions of fact that he did.

63. The grounds of appeal contain, also, serious criticism of the decision of the Enterprise Chamber; and of the evidence upon which it relied in deciding to remove Mr Le Comte from office as a director of EEU. It is not, of course, open to the courts in this jurisdiction to go behind the findings and decision of the Enterprise Chamber; but it must be said that no material has been put

before this Court to justify the criticisms made on Mr Le Comte's behalf. In particular, no material has been put before this Court to support the view that the Enterprise Chamber was misled by the report of Mr van Hees.

The disposal of this appeal

64. The issue on this appeal, therefore, is whether the judge was entitled – on the basis of the findings of fact which he made – to take the view that, in all the circumstances, it was just and equitable that the Company be wound up. In my view there is no doubt that he was entitled to take that view.

65. If the dispute between Mr Heinen and Mr Le Comte in relation to the Company is to be considered in the context and circumstances of the whole business venture of which it is part – a premise adopted by the judge and, as I have said, not challenged on this appeal - it is necessary to have in mind that the effect of the corporate structure established in 2003 for the purposes of the joint venture was that the principal vehicle for the development and commercial exploitation of TheWheel and its associated technology was the e-Traction Group; and, in particular EEU (formerly SPI). The e-Traction Group was controlled through EWW, the Luxembourg limited partnership in which the shares in the underlying companies (including EEU) were held. EWW was controlled by its general partner, EMS, a Luxembourg corporation. The Company (Freerider) was one amongst a number of limited partners of EWW: the other limited partners being Mr Heinen's holding company (AHAB), Mr Le Comte and the Investor Group.

66. The effect of the corporate structure was to vest control of EEU and the e-Traction Group in EMS. The shareholders of EMS were Mr Heinen (or AHAB) and Mr Le Comte: Mr Heinen and Mr Le Comte were its sole directors. The Company (Freerider) held no shares in EMS; and, save as a limited partner of EWW, had no control over the business and management of EEU. The Company's role in the structure established in 2003 was as a tax-free vehicle through which the income and profits that (it was hoped) would be generated by the commercial exploitation by the e-Traction Group of

TheWheel and its associated technology could be enjoyed by its shareholders, Mr Heinen (or AHAB), Mr Le Comte and the Investor Group. That was to be achieved through the contractual provisions of the inter-company agreements: the APA, the TASA and the IPLA.

67. The difference of view between Mr Heinen and Mr Le Comte as to the way in which EEU should carry on its business – that is to say, as to the way in which TheWheel and its associated technology should be developed and commercially exploited – was resolved, in practice, by the decision of the Enterprise Chamber of the Amsterdam Court of Appeal in December 2007 (i) to confirm the suspension of Mr Le Comte as a director of EEU and (ii) to direct that the shares in EEU (then held by EWW) be held by a trustee. That decision was confirmed in September 2008. The effect of those decisions has been that – notwithstanding the provisions of the First Shareholders' Agreement in relation to EMS and EWW – Mr Le Comte is not able to override the views of Mr Heinen as to the development and commercial exploitation of TheWheel and its associated technology.

68. Further, as it seems to me, Mr Le Comte's complaints that that position has come about by reason of Mr Heinen's failure to comply with his obligations under the First Shareholders' Agreement are misconceived. First, as I have said, the reason why Mr Le Comte is not able to override the views of Mr Heinen as to the development and commercial exploitation of TheWheel and its associated technology is that the Enterprise Chamber has made orders to that effect. Second, in the light of the judge's findings of fact, Mr Heinen was entitled to act on basis that Mr Le Comte had "abandoned" whatever right he might otherwise have had to override Mr Heinen's views as to the management of EEU and the e-Traction Group in the course of the telephone conversation of 15 August 2006.

69. The relevance of the First Shareholder's Agreement since December 2007 (and, perhaps, since August 2006), as it seems to me, is confined to the questions: (i) who should speak for the Company in the circumstances which have arisen since 31 March 2008 when EEU gave notice of termination of the

three commercial agreements: the APA, the TASA and the IPLA and (ii) who should speak for the Company in relation to the recovery of the royalty payments alleged to be due under the IPSA. In the events which have happened the First Shareholders' Agreement is no longer of relevance to the management of EEU and the e-Traction Group.

70. The judge explained (at paragraph 32 of his judgment) that the question whether or not EEU was entitled to determine the three inter-company agreements is the subject of litigation currently pending in the courts of New York. He took the view, correctly as it seems to me, that it was not for him to decide that question on the petition; and he did not do so. That question was not before this Court on the appeal. But it is, of course, important to keep in mind that, if EEU was entitled to determine the three inter-company agreements, then the Company has no further commercial role in the structure established in 2003: it will not be the recipient of income and profits (if any) generated by the commercial exploitation by the e-Traction Group of TheWheel and its associated technology. It is also important to keep in mind, as it seems to me, that – in the circumstances that the Dutch tax authorities have determined that the Company is to be treated as resident in the Netherlands – a decision that EEU was not entitled to determine the three inter-company agreements will have little, if any, practical effect. A similar point can be made in relation to the recovery of royalty payments alleged to be due under the IPLA.

71. Whether or not the three inter-company agreements remain in force – and whether or not accrued royalties are payable to the Company under the IPLA - the income and profits (if any) generated by the commercial exploitation by the e-Traction Group of TheWheel and its associated technology will be subject to tax in the Netherlands and will, if distributed, be held for the benefit of Mr Heinen (or AHAB), Mr Le Comte and the Investor Group; either in their capacity of limited partners of EWW or in their capacity as shareholders of the Company. In those circumstances it is not at all clear why it is thought that the interests of parties ultimately entitled to the income and profits generated by

the commercial exploitation of TheWheel and its associated technology are best served by protracted (and, no doubt, expensive) litigation in New York, the Netherlands, or elsewhere, in relation to the inter-company agreements.

72. But for the First Shareholders' Agreement – in so far as it is still of relevance to the limited extent which I have described – there could be no doubt that the Company should be wound up on the just and equitable ground. The relationship of trust and confidence between Mr Heinen and Mr Le Comte, upon the basis of which the Company was established, has irretrievably broken down; Mr Heinen has been excluded from any role as a director of the Company; and the primary purpose for which the company was established (to provide a tax free vehicle for the distribution of income and profits generated by the commercial exploitation of TheWheel and its associated technology) can no longer be achieved. In those circumstances the real issue before the judge, if I may say so, and the issue on this appeal is whether the provisions of the First Shareholders' Agreement (to the extent that they are still of relevance) should lead to a different conclusion.

73. In my view the answer to that question is plainly "No".

74. I am content to assume that the effect of Section 1(2) in the First Shareholders' Agreement is that, in the circumstances contemplated by the parties when that agreement was made in 2003, the view of Mr Le Comte in relation to a decision whether the Company should pursue litigation to recover payments alleged to be due from third parties, or to challenge the termination of agreements by third parties, should ultimately prevail over the view of Mr Heinen. But, as it seems to me, the circumstances contemplated by the parties in 2003 did not include circumstances in which one entity within the corporate structure established at that time (in the present case, EEU or the e-Traction Group) is in dispute with another entity within that structure (in the present case, the Company). The reason is that the First Shareholders' Agreement applied both to EMS (and through EMS to EWW and the companies owned and controlled by EWW) and to the Company. Given the provisions of the First Shareholders' Agreement, it could not have been in the contemplation of

the parties that there could be litigation between EEU and the e-Traction Group, on the one hand, and the Company on the other hand: there was no room for dispute between entities within the corporate structure in relation to the matters on which Section 1(2) gave Mr Le Comte the deciding voice.

75. The position in the present case has arisen in circumstances not contemplated by the parties to the First Shareholders' Agreement: that is to say, in circumstances where, following breakdown of the relationship on mutual trust and confidence underlying the agreement, the control of EEU and the e-Traction Group has been vested in Mr Heinen to the exclusion of Mr Le Comte by the order of the Enterprise Chamber. Those circumstances have given rise to disputes between entities within the corporate structure established in 2003 which could not have arisen if the provisions of the First Shareholders' Agreement had been applied as the parties contemplated they would be. In those circumstances, as it seems to me, there is no reason why the provisions of the First Shareholders' Agreement should lead the court to decline to make an order for the winding of the Company on the just and equitable ground if that is what the circumstances otherwise require.

76. The question, then, is whether the court should exercise the power conferred by section 95(3) of the Companies Law and make an order pursuant to that section as an alternative to a winding-up order. Whether or not to do so was plainly within the discretion of the judge. In my view there is no basis upon which it can be said that he was not entitled to exercise his discretion as he did and for the reason which he gave.

The petitioner's appeal from the order of 25 June 2010

77. As I have said, in his order of 13 May 2010 the judge reserved the costs of the petition (including costs previously reserved by an order of 20 November 2009) for consideration at a later hearing. That hearing took place on 25 June 2010. At that hearing the judge ordered Mr Le Comte to pay the petitioner's costs of the petition on the standard basis. He gave no reasons for refusing Mr Heinen's application that costs be taxed or assessed on the indemnity basis.

78. Mr Heinen pursues that application by way of cross-appeal from the order of 25 June 2010. Four grounds are advanced in his amended respondent's notice dated 16 July 2010:

(1) That Mr Le Comte conducted the litigation in an unreasonable manner, "in that he sought to delay the progress of the Petition as much as possible by bringing numerous applications which were either dismissed or abandoned thus increasing [Mr Heinen's] costs".

(2) That Mr Le Comte gave untruthful evidence in the litigation.

(3) That, after the presentation of the petition, but before the hearing of the petition, Mr Le Comte, without consulting his co-director, Mr Heinen, caused the Company to enter into a secured loan transaction with a company (733 Properties Inc) controlled by an associate.

(4) That Mr Le Comte deliberately concealed that transaction from Mr Heinen and from the court until after the costs order had been made on 25 June: the transaction, it is said, was effected for the purpose of frustrating the effect of a winding up order, if made.

79. In a skeleton argument dated 29 July 2010 Mr Le Comte accepts that he caused the Company to enter into a loan transaction with 733 Properties Inc without consulting Mr Heinen; asserts that the funds advanced have all been used for the benefit of the Company; and states that the majority of the funds have been used to fund ongoing litigation against Mr Heinen and EEU. He denies that the purpose of the transaction was to frustrate the effect of a winding up order, if made. That denial is difficult to reconcile with e-mails sent by Mr Le Comte on 6 April 2009, 28 May 2009 and 5 June 2009 to Mr Jonathan Durst, who is said to control 733 Properties Inc.

80. The question whether or not a party's conduct in connection with the proceedings should lead the court to order that costs awarded against that party should be taxed or assessed on the indemnity (rather than the standard) basis is pre-eminently a matter for the judge who has had conduct of the proceedings. He is in the best position to decide whether the proceedings have been conducted in a manner which exposed the successful party to the risk of incurring unrecoverable costs (being the difference between the amount

assessed on the standard basis and the amount that would be assessed on the indemnity basis) which, in justice he should not have to bear. It will be only in rare circumstances that an appellate court will interfere with the judge's decision to award costs on the one basis rather than the other.

81. For my part, if the grounds advanced on behalf of Mr Heinen were confined to those numbered (1), (2) and (3), I would not think it right to interfere with the judge's decision to award costs on the standard basis. Grounds (1) and (2) cover matters that would have been known to the judge at the time when he made the costs order; and which he can be expected to have taken into account and given the weight which he thought appropriate. Ground (3), of itself, does not expose Mr Heinen to costs which he ought not to bear: if the transaction was not entered into in the ordinary course of the Company's business, it can be expected that it will be set aside under the provisions of section 99, or section 145 of the Companies Law.

82. I am concerned, however, as to the ground numbered (4). Had the judge known of that allegation at the time when he made his costs order, he could have been expected to investigate whether it could be made good; and, if made good, might well have reached a different conclusion as to the appropriate basis for the taxation of the petitioner's costs.

83. This Court is not in a position to investigate whether the allegation advanced under ground (4) can be made good. Accordingly, I would direct that the petitioner's application dated 17 June 2010 be remitted to the judge for consideration whether the order for costs on the standard basis (contained in paragraph 1 of his order dated 25 June 2010) should be varied in the light of the allegation in paragraph 4(d) of the amended respondent's notice dated 16 July 2010.

Mr Le Comte's challenge to the ruling of 30 July 2010

84. The order of 25 June 2010 provided, also, that Mr Le Comte repay to the liquidators of the Company the sum of US$ 167,522 as reimbursement for payments made by the Company to the advocates instructed (or purportedly

instructed) to defend the petition on its behalf. So far as I am aware Mr Le Comte has not filed formal notice of appeal from that order; but his memorandum and grounds of appeal, as amended on 14 July 2010, includes the following (at paragraph 7.7):

> "The Learned Judge failed to consider the rule of insolvency set-off when he ordered on 25 June 2010 that (i) Pieter Le Comte reimburse the Company's liquidators for all the Company's costs incurred in defending the Petition and (ii) Pieter Le Comte by 5.30pm on 16 July 2010 repay the sum of US$167,522 to the Company's liquidators as reimbursement for the payments made by the Company to Turner & Roulstone on 25 August 2009, 23 September 2009, 16 October 2009 and 13 November 2009."

Mr Le Comte seeks to challenge that order on the basis that monies which he caused to the Company in respect of the costs of the petition should be set off against monies due from the Company to him as a pre-liquidation creditor.

85. The judge considered that challenge in a Ruling which he gave on 30 July 2010, following the hearing of a summons and motion, issued by Mr Heinen on 21 July 2010, seeking enforcement of the relevant paragraph of the order of 25 June 2010. At paragraph 5 of that Ruling he said this:

> "As far as the question of set-off is concerned, I am satisfied that it is not applicable in these circumstances as a matter of law – see *A &BC Chewing Ltd, Re a company, ex parte Johnston* etc. It is clear to me that the order dated 25th June was made on the basis of misfeasance by Mr Le Comte as a director of the Company in using the Company's monies to fund his defence of the Petition in the light of the various authorities cited to the Court at the hearing of the Petitioner's application for that order. Furthermore it is almost trite law, both in this country and in England, that a payment ordered to be made by a director of a company to a company as a result of the director's misfeasance cannot be made the subject of an insolvency set-off – see *Anglo French Co-operative Society, ex parte Pelley; Manson v Smith (Liquidator of Thomas Christy)* and *Smith v Bridgend Borough Council.* Neither Mr Le Comte's undertaking in May 2009 nor the order of 25th June 2010 made any provision in respect of set-off. I am of the opinion that in circumstances such as these the law does not permit set-off."

86. In my view the challenge to the order of 25 June 2010 is misconceived: in that that order, made in proceedings between Mr Heinen and Mr Le Comte, was not concerned with any question of set-off as between Mr Le Comte and the

Company. Mr Le Comte has not appealed from the order of 30 July 2010: which, again, was made in proceedings to which the Company was not party. If Mr Le Comte seeks to assert, against the Company, that he is (or was) entitled to set-off the monies which he was ordered to pay by way of reimbursement of costs against whatever debt may be the subject of a proof in the liquidation, he should have done so in proceedings to which the Company (or its liquidators) are joined.

87. I am not persuaded that this Court should make any order on this appeal in relation to the issue raised by paragraph 7.7 of the appellant's amended memorandum and grounds of appeal.

Justice Mottley, Justice of Appeal

88. I agree with the judgment of Chadwick P.

Justice Conteh, Justice of Appeal

89. For the detailed reasons stated in the judgment of Chadwick P, the draft of which I have had the benefit of reading, I concurred in the dismissal of the appeal in this case on 24 August 2010. And, for the reasons stated in paragraphs 77 to 83 of Chadwick P's draft judgment, I agree that the learned trial judge's order that costs of the petition should be on the standard basis in favour of the petitioner (Mr Heinen) should not be disturbed, save to the extent there indicated.

Chadwick P

Mottley JA

Conteh JA