Perpetual Media Capital Limited and Enevoldsen et al
Court of Appeal
31st March, 2014

JUDGMENT 16/2014

Appeal against a decision where it was held that the Defendants/Respondents had a complete defence to allegations made against them of breach of duty.

Approved Text
31.03.2014

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION
Appeal No. 465

14th March 2014

PERPETUAL MEDIA CAPITAL LIMITED **Appellant**

-and-

DAVID ENEVOLDSEN

NICHOLAS HANNAH

ADRIAN HOWE

BENJAMIN TUSTIN

MARLBOROUGH TRUST COMPANY LIMITED **Respondents**

Advocate A C Williams appeared for the Appellant
Advocates I C Swan & T W McGuffin for the Respondents

DECISION

Beloff JA President

Introduction

1. This is an appeal by the Plaintiff/Appellants against a decision of McMahon, Deputy Bailiff ("the Deputy Bailiff") dated 26th June 2013 ("the Decision'') in which, on the hearing of a preliminary issue ordered by consent on 14th December 2013 he held that the Defendants/Respondents had a complete defence to allegations made against them of breach of duty and, in necessary consequence, dismissed the Plaintiff/Appellants' claims.

The Procedural History

2. By a Cause tabled on 21 April 2011, the Plaintiff/Appellant ("Perpetual'') claimed £5,536,403 and US$17,077,353 from the first to fourth Defendants/Respondents as set out in numerical order in the title to the action above ("the Directors'') and the fifth Defendant/Respondent ("Marlborough") in respect of alleged breaches of duty owed to Perpetual. Perpetual had made film funding arrangements in respect of three films with the titles "Ironclad", "Game of Death" and "Machete". Perpetual alleges that the Directors and Marlborough caused Perpetual to enter into loan agreements under which Perpetual had sustained losses which amount to the sums claimed in the Cause. At the material times, the Directors were directors of Perpetual and were, or controlled, the shareholders of Perpetual. They were also directors of Marlborough.

3. By their original defences lodged on 22 July 2011 the Directors and Marlborough denied any breaches of duty.

4. On 29 June 2012, the Court made a Consent Order giving the Directors and Marlborough leave, pursuant to rule 59 of the Royal Court Civil Rules, 2007, to amend their Defences. Materially one of the amendments made was to plead a new paragraph 52B in the following terms,(in which Perpetual was abbreviated as "PMCL") ":

> "*Further, Article 172 of PMCL's Articles of Association provides:*
>
> *"The Directors Managing Directors managers agents Auditors Secretary and other officers or servants for the time being of the Company shall be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they … may incur by reason … of any contract entered into or any act in or about the execution of their respective offices except such (if any) as they shall incur by or through their own wilful act neglect or default respectively and none of them shall be answerable for the acts receipts neglects or defaults of the others of them … or for any loss misfortune damage resulting from any such cause aforesaid or which may happen in or about the execution of their respective offices … except the same shall happen by or through their own wilful act neglect or default."*
>
> *If, which is denied, the First to Fourth Defendants, or any of them, breached their duties in the manner alleged by PMCL and PMCL has, as a consequence of any such alleged breach, suffered any loss or damage then by reason of Article 172:-*
>
> *i) The First to Fourth Defendants were and are not answerable for any loss or damage suffered by PMCL as a result of any contract which PMCL entered into or for any other loss or damage which PMCL has suffered in or about the execution by the Defendants of their respective offices;*
>
> *ii) The First to Fourth Defendants are not answerable for the acts and defaults of each other; and/or*
>
> *iii) The First to Fourth Defendants are or are entitled to be fully indemnified out of the assets and profits of PMCL for any liability which they have incurred or may incur in the future (including any liability for interest and/or legal costs) as a result of any contract PMCL entered into or any act undertaken by those Defendants in or about the execution of their respective offices; and/or*
>
> *iv) If, contrary to the Defences pleaded herein, the First to Fourth Defendants, or any of them, are held to be liable to PMCL, the liability of PMCL to indemnify the First to Fourth Defendants is set-off pro tanto against any liability to PMCL, thereby extinguishing it. Accordingly PMCL's claim should be struck out against the First to Fourth Defendants on the grounds of circularity.*

Further if, which is denied, Marlborough owed the duties alleged by PMCL and breached them in the manner alleged, Marlborough is entitled to the same exemptions and protections under Article 172 as the First to Fourth Defendants by reason of the fact that Marlborough, on PMCL's case, was a manager, agent, officer or servant of PMCL."

5. The parties rightly agreed that this line of defence, if soundly based, would amount to a complete answer to the Perpetual's claim and identified preliminary issues, which were set out in a Consent Order dated 14 December 2012 as follows:

> "*1.1 whether the Plaintiff's Articles of Association provide the Defendants, or any of them, with an exemption from and/or an indemnity against any liability that would otherwise attach to them as pleaded in the Plaintiff's Cause;*
>
> *1.2 if the answer to 1.1 (above) is yes, whether such exemption and/or indemnity is void pursuant to section 157 of the Companies (Guernsey) Law 2008 (as amended) or remains valid as regards the liabilities pleaded in the Plaintiff's Cause by reason of Regulation 10 of the Companies (Transitional Provisions) Regulations 2008;*
>
> *1.3 whether in consequence of the answers to 1.1 and 1.2 (above) paragraph 52B of the Defendants' Amended Defences dated 22 June 2012 provides the Defendants, or any of them, with a complete defence to the Plaintiff's Cause dated 18 April 2011.*"

6. 0n 28 February 2013 .the hearing of the preliminary issues took place before the Deputy Bailiff.

Preliminary Issues

7. The resolution of preliminary issues can be a desirable method of achieving an early resolution of what might otherwise be costly and time consuming litigation. They should be confined to points of law; but even then, as was said in *Tilling v Whiteman* 1980 AC 1 by Lord Scarman at p.25"*Preliminary points of law are too often treacherous short cuts. Their price can be, … delay, anxiety and expense''.* As was also noted by Coulson J in *Carillon JM Limited v Bath and North East Somerset County Council* 2009 EWHC 166 at para 6''*significant difficulties can arise where the proposed preliminary issues are accepted by all parties to be important but where there are a large number of factual disputes, or where the evidence in respect of the proposed preliminary issues may have to be trawled over a second time, at the full trial, whatever the result of the preliminary issues''.*

8. The Deputy Bailiff said'' *As Advocate Swan correctly pointed out, this was the trial of these preliminary issues; they will not be addressed again even if the Court finds in favour of the Plaintiff and, to the extent that it finds in favour of any Defendant, that will conclude matters in dispute between that Defendant and the Plaintiff. The issues are to be determined on the basis of combining the admitted facts, and for these purposes the Defendants take the case pleaded against them on liability as having been established, and inferences that can properly be drawn from the documents.''* (para 4)

9. I would respectfully gloss that observation to this extent. It must be open to a Court, seized of a preliminary issue, to rule on it in a way which still leaves facts to be determined at a subsequent hearing as the citations in para 7 confirm. In an extreme case indeed the Court could decline to hear the preliminary issue, despite it having agreed previously to do so, because the issue cannot be properly resolved without hearing evidence. In this particular case, however, while Advocate Williams submitted that issue 1.1 might require the Directors and Marlborough to establish by

their own testimony the circumstances in which they could claim to have contracted on terms of the exemption/indemnity in the Articles, for reasons I shall explain later, I reject that submission.

Background Facts

10. On 16 October 2007 Perpetual was incorporated as Perpetual Film Holdings Limited. Its Memorandum and Articles of Association of that date included Article 153, headed "INDEMNITY" which provided:

> "*The Directors Managing Directors managers agents Auditors Secretary and other officers or servants for the time being of the Company and the trustees (if any) for the time being acting in relation to any of the affairs of the Company and their respective heirs and executors shall be fully indemnified out of the assets and profits of the Company from and against all actions expenses and liabilities which they or their respective heirs or executors may incur by reason of any contract entered into or any act in or about the execution of their respective offices or trusts except such (if any) as they shall incur by or through their own wilful act neglect or default respectively and none of them shall be answerable for the acts receipts neglects or defaults of the others of them or for joining in any receipt for the sake of conformity or for any bankers or other person with whom any moneys or assets of the Company may be lodged or deposited for safe custody or for any bankers or other persons into whose hands any money or assets of the Company may come or for any defects of title of the Company to any property purchased or for insufficiency or deficiency of or defect in title of the Company to any security upon which any moneys of the Company shall be placed out or invested or for any loss misfortune or damage resulting from any such cause as aforesaid or which may happen in or about the execution of their respective offices or trusts except the same shall happen by or through their own wilful act neglect or default.*"

11. The subscribers were Marlborough and Marlborough Nominees Limited. Those two companies were appointed as Perpetual's first directors. On or about 4 March 2008 the two shares to which they subscribed were transferred to the Second and Fourth Directors.

12. On 17 February 2009 Perpetual changed its name to Perpetual Media Capital Limited. On or about 17 March 2009, the Fourth Director's share in Perpetual was transferred to Perpetual Media Holdings Limited.

13. On or about 20 March 2009, the Second Director transferred his share in Perpetual to Perpetual Media Holdings Limited and Perpetual issued three shares to Rockmount Media Holdings Limited.

14. On 20 March 2009, the two corporate directors resigned and were replaced as directors by the Directors.

15. On 23 March 2009, by written resolution, Rockmount Media Services Limited and Perpetual Media Holdings Limited, as the members of Perpetual, resolved to adopt replacement Articles of Association, which included Article 172, to which reference is made in paragraph 52B of the Amended Defences. It contained identical wording to Article 153.

16. In an e-mail dated 19 March 2009 sent by the Fourth Director to three persons associated with the structure of which Rockmount Media Holdings Limited forms a part, he described the position of Marlborough:

> "*This is not an ordinary client relationship. [The Plaintiff] is managed and controlled entirely in Guernsey and we are not simply a rubber stamping operation. The reasons for this are as follows:*

1. *We are shareholders in the business and therefore it is in our vested interests to ensure its success.*

2. *We have been working in film finance for 6 years now and been bridging for 4 therefore our knowledge and expertise in this area is far greater than most people in the industry. We utilise this expertise to make informed decisions and add value to the business.*

3. *We wish to protect the interests of the shareholders and therefore must be involved in all transactions from start to finish and have a complete understanding of the business.*

4. *Clearly it is required from a tax position to be fully managed from Guernsey.*

In terms of the resources we are providing to [the Plaintiff] this will consist of one full time member of staff (with associated overhead costs), support and cover for that person from an administration team, time from me as the principal director in charge of [the Plaintiff] assessing each deal and managing the company as a standalone business, and other director input in each decision being made for the business and ensuring their knowledge of the business is maintained.

These are some of the activities that we will be undertaking:

1. *Bookkeeping all transactions and reporting P&L and balance sheet on a regular basis.*

2. *Assessing each deal from the outset for commercial viability.*

3. *Undertaking due diligence on all parties to each deal.*

4. *Producing continual cash flow projections for each deal and the company as a whole.*

5. *Managing deal flow/cash flow to ensure funds are utilised as much as possible and that sufficient cash is available for deals in the pipeline. This requires an understanding of each films financial closure and any likelihood of delays or early repayment.*

6. *Reviewing all security and deal documentation.*

7. *Holding several investment committee meetings for each deal.*

8. *Liaising with third party lenders to ensure cash availability matches deal flow.*

9. *Producing loan agreements with lenders, managing their expectations, accounting for their returns and maintaining those relationships for future lending.*

10. *Very regular meetings with PMCA to discuss business plan, recent performance and current deal position.*

11. *Managing alternative film finance structures whereby [the Plaintiff] can earn from advisory fees and commissions.*

12. *Assessing and negotiating potential joint ventures with film financiers, e.g. Prescience.*

In terms of our profitability from providing these services as a trust company we are working at an almost cost level. To supply one dedicated member of staff and a large

> *chunk of my time if we were to charge on our normal basis then a ball park figure would be £200k. We are taking the view that our profits will come from dividend pay-outs and value within the company.*
> *We have considered the possibility of outsourcing some or all of the admin function however the knowledge level required to be able to run such a company is substantial and very hard to come by. The element of control that we maintain by dealing with this in-house is invaluable for the company and the shareholders.*
> *To summarise we treat this company as a standalone business where we provide both an in depth administrative function and also a highly knowledgeable management control with a vested interest.*"

17. Accordingly at para 37 of the Cause Perpetual alleged that Marlborough *"provided at all material times, the Directors, administration, management and fiduciary services"* to Perpetual.

18. In July and August 2009 the decision to enter into the film funding arrangements that form the basis of Perpetual's claim was taken.

Summary of parties' submissions

The Appellants

19. On behalf of Perpetual, Advocate Williams submitted that, as the Directors were not privy to the contract between the members of Perpetual inter se and between each of them and Perpetual, they could not rely directly on the terms of Article 172 (or its predecessor, Article 153). Therefore in the absence of any evidence that the Directors accepted their appointments on the basis of the exemption or indemnity contained in Article 153 or 172 they could not take the benefit of it. In particular, the basis on which Marlborough was appointed to act in respect of Perpetual involved the resolution of a complex factual question which was not suitable for determination at a preliminary hearing. Accordingly, Advocate Williams submitted that issue 1.1 should be answered "no".

20. However, Advocate Williams submitted that if issue 1.1 were to be resolved against Perpetual in respect of the Directors, the chronology showed that they did not assume their positions as directors of Perpetual until after the commencement of the Companies (Guernsey) Law 2008 ("New Law"), with the result that the exemption and indemnity provision could not be applied to them under the extension offered by the Companies (Transitional Provisions) Regulations 2008 ("the transitional provisions"). Accordingly, he submitted issue 1.2 should be answered "no".

21. Therefore, he submitted that issue 1.3 should also be answered "no" and the case proceed to trial.

The Respondents

22. On behalf of the Directors and Marlborough, Advocate Swan submitted that the predecessor to Article 172 of Perpetual's Articles of Association, Article 153, was valid in Guernsey law when Perpetual was incorporated in 2007. When the Articles of Association were replaced in 2009, no modification was made to Article 153, save that it was re-numbered as Article 172. . That Article provided the basis upon which the Directors took up their office and Marlborough its post. Accordingly, Advocate Swan submitted that the answer to issue 1.1 should be answered "yes".

23. As to section 157 of the New Law and, in particular, the effect of the transitional provisions extending the time during which provisions such as Article 172 (as it became) could be relied upon. Advocate Swan argued that the wording was clear and meant that any director for the time being of a company was permitted to rely on such an exemption or indemnity provision until such time as the legislature terminated the director's ability to rely on it i.e. on 1st January 2010

and that the exemption or indemnity remained valid at the material time i.e. July and August 2009. Accordingly he submitted that issue 1.2 should also be answered "yes".

24. Advocate Swan further noted that the position of Marlborough was better than the position of the Directors, because the limitations on exemptions and indemnities for directors introduced into Guernsey law by section 157 of the New Law did not affect the position in relation to a company's managers.

25. Therefore, he submitted that issue 1.3 should also be answered "yes" and Perpetual's claims against all five Defendants should be dismissed.

Existence of exemption/indemnity

Construction of Article 153/172

26. There is no issue of construction.

The Deputy Bailiff aptly emphasised "*the breadth of its coverage"* of the Article and continued

> *"The Article falls into three parts. The opening words explain who can benefit from what follows. The next part provides that those persons "shall be fully indemnified", albeit not in respect of any expenses or liability incurred "by or through their own wilful act neglect or default". This part amounts to an indemnity provision attaching to such of their personal defaults as are covered. The final part provides that "none of them shall be answerable" for the defaults of the others, once again subject to an exception for those occurring "by or through their own wilful act neglect or default". Because they are "not answerable", this is treated as an exemption provision."* (para 11)

27. Advocate Williams took his stand not on the basis that if applicable to them the Article on its true interpretation failed to provide the Directors and Marlborough with the exemption or indemnity that they claimed, but rather that it did not apply to them at all.

28. As to this it was accepted by Advocate Swan, despite the lack of clarity in the amended defence on this point, that the Article did not *per se* apply to the Directors or Marlborough. The Article bound only the members of the Company *inter se* and the members and the company. This is vouched for by the provisions of section 20(3) of the New Law, which was inserted by section 3 of the Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2008:

> "*Subject to the provisions of this Law, the memorandum and articles of a company are, from the time of incorporation, binding on the company and its members in all respects as if the memorandum and articles –*
>
> *(a) were comprised in an agreement duly executed by the company and each member, and*
> *(b) contained covenants on the part of the company and each member to observe all provisions thereof.*"

reflecting a similar provision in section 6(3) of the Companies (Guernsey) Law, 1994.

29. The effect of such statutory provisions was accurately described by Ferris J in *John v Price Waterhouse* [2002] 1 WLR 953, 960:

> "*The articles of a company constitute a contract between the members of the company inter se and between each of them and the company but they do not, without more, constitute a contract between the company and its directors.*"

30. The key question under Issue 1.1 was whether the Articles were expressing or impliedly incorporated into the contracts of the Directors or Marlborough. [See *In re New British Iron Company, ex parte Beckwith* [1898] 1 Ch 324 per Wright J at p.326.]

31. By reference to *John v Price Waterhouse* (*supra*), Advocate Williams for Perpetual submitted that the court will not, without more, imply a term and that it was, therefore, necessary to determine this factual issue after hearing evidence. In that case Ferris J said at p.60 that *"it seems to me that comparatively little will be required to satisfy the Court"* of such incorporation.

32. Advocate Williams submitted that because the Directors had chosen not to submit any evidence, relying solely on the documents placed before the Court, which included four "standard" letters from the Directors dated 20 March 2009 in which they confirmed without any elaboration that they accepted appointment as directors of Perpetual, they had failed to pass even the low evidential threshold required. He drew a distinction between little evidence and no evidence.

33. Advocate Swan submitted that the very fact that the Directors accept their office against a background of the Article itself which was a matter of public record justified the inference of incorporation. He relied on *In re Anglo-Austrian Printing and Publishing Union (Isaacs' Case)* [1892] 2 Ch 158 where Stirling J stated (at 164):

> "*… where a man has accepted the office of director, and acted as such, there ought to be inferred an agreement between him and the company, on his part that he will serve the company on the terms as to qualification and otherwise contained in the articles of association, and on the part of the company that he shall receive the remuneration, and all the benefits which those articles provide for directors.*"

and the Court of Appeal when Bowen LJ further confirmed the position (at 167):

> "*What is the effect of the signature of the articles of association by this gentleman? At all events, as soon as he acts as a director of the company, and places himself in the position for which the articles provide, these articles shew the terms of the implied contract which thereupon arises between himself and the company. That is the effect of these articles – they amount to an offer put forward by the company to persons intending to become directors of the terms on which the directors are to act. It is perfectly true that the offer is contained in articles, which are not drawn up as between the company and its directors, but nevertheless the company puts forward the terms of the articles as the terms by which it will be bound; and the director by becoming and acting as director of the company accepts that position.*"

34. Both the other members of the Court of Appeal in that case (Lindley and Kay LJJ at p.166 and 169 respectively) while also adverting to the signature, found that the very fact of acting as a Director established that a person was bound by the Articles of Association, materially, both as to benefit (as in this case) and as to burden (in others).

35. In so far as there is any discrepancy between the approach in the cases of John and Isaacs I prefer that Guernsey law should reflect the latter. In short there is a presumption, albeit rebuttable, that directors take up office on the terms in the company's articles. The presumption may be rebutted in circumstances such as obtained in Telecommunication Ltd v Wilmbury Limited (2002) B CC 958 which concerned a director with *"total lack of experience or knowledge as to commercial matters"* [31], which would not be a description appropriate to the four Directors.

36. However even if John were to be preferred, the threshold is low and the Deputy Bailiff drew appropriate inferences from the following matters recorded in his judgment to show that it had been traversed.

> *"The First to Fourth Defendants were all more clearly involved with the affairs of the Plaintiff, as explained in the Fourth Defendant's message of 19 March 2008. The Fifth Defendant, which the other Defendants controlled, was a subscriber when the Plaintiff was incorporated and one of its first directors. Their level of knowledge and understanding of how the company intended to approach Article 153 or 172 was as great as it could be and an appropriate inference about their experience and knowledge of relevant commercial matters can properly be drawn."* [15]
>
> *"Whilst there may be no evidence from any of the First to Fourth Defendants setting out in any detail the basis on which they understood they were taking office, I consider that it is a proper inference for me to draw that they were all sufficiently involved in the establishment of the Plaintiff the previous year and, as directors of the Fifth Defendant, had approved the subscription by that company to the Plaintiff's constitutional documents, meaning that they were accepting the offer of the Plaintiff to act as its directors on the terms set out in the Articles of Association, including, and most importantly, original Article 153. They have passed the low threshold for incorporation of this implied term."* [18]
>
> *"I regard it as reasonable for me to bear in mind that the involvement of the First to Fourth Defendants in the Fifth Defendant is such that they are not inexperienced or only occasional directors of companies. Indeed, they run a licensed fiduciary operation. Accordingly, whilst their first thought may not have been to plead the benefit of the indemnity or exemption provision in the Plaintiff's Articles of Association, I do not regard that initial oversight as displacing the general approach articulated by Bowen LJ. In my judgment, therefore, in principle the First to Fourth Defendants take the benefit of the indemnity or exemption provided by Article 153 or 172 of the Plaintiff's Articles of Association."* [19]

37. Advocate Swan alternatively contended that, if the fact of a Director's signature was crucial to the decision in Isaacs, in the present case the Articles had actually been signed by one of the Directors (Mr Hannah) on behalf of Marlborough. It is unnecessary to consider whether that alternative contention would itself also suffice to sustain the Directors' case on Issue 1.1.

Marlborough

38. There is no issue that the indemnity or exemption in the Article applies to managers. Before the Deputy Bailiff an issue was raised as to whether Marlborough fell within that definition. It was in my view, rightly not resurrected before us, and was decided by Perpetual's own pleading and further supported by material placed before the Royal Court. The e-mail of 19 March sent by the Fourth Director to the three persons associated with the Rockmount structure makes it quite clear that the role performed by the Marlborough, primarily through the Fourth Director, but with appropriate involvement from the First to Third Directors and actual work being undertaken by one or more employees of the Marlborough, was to ensure that the entirety of Perpetual's management was undertaken in Guernsey by them.

39. Further in my judgment the indemnity or exemption is to be taken as being incorporated into Marlborough's appointment in the same way and for the same reasons as in the case of the Directors.

Conclusion on issue 1.1

40. For these reasons, in agreement with the Deputy Bailiff, the answer I give to the first of the preliminary issues is "yes". Perpetual's Articles of Association provide all five of the Defendants with an exemption from and/or an indemnity against any liability that would otherwise attach to them as pleaded in the Perpetual's Cause. I therefore, move on to consider issue 1.2.

Effect of the New Law and Transitional Provisions

41. Issue 1.2 involves a question of statutory interpretation.
Section 157 of the 2008 Law ("the New Law") provides:

> "*(1) Any provision that purports to exempt a director of a company (to any extent) from any liability that would otherwise attach to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company is void.*
> *(2) Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as is permitted by section 158 or 159.*
> *(3) This section applies to any provision, whether contained in a company's memorandum or articles or in any contract with the company or otherwise.*
> *(4) Nothing in this section prevents a company's memorandum or Articles from making such provision, as was before the commencement of this Law Lawful for dealing with conflicts of interest".*

42. The Companies (Guernsey) Law, 2008 (Commencement) Ordinance, 2008 was made by the States Legislation Select Committee on 19 May 2008 under the relevant provisions of the 2008 Law and the powers conferred on it by Article 66(3) of the Reform (Guernsey) Law, 1948 and brought these provisions into force with effect from 1 July 2008.

43. Between the making of the Commencement Ordinance and the date the provisions of the New Law came into force, the Commerce and Employment Department of the States of Guernsey made the Transitional Provisions. Regulation 10 provides:

> "*(1) Section 157(1) and (2) of the new Law does not apply to an exemption from liability or indemnity* ***provided*** *before the date of commencement of the new Law until the 1st January, 2010.*
> *(2) Accordingly –*
> *(a) the validity and enforceability of any such exemption from liability or indemnity shall continue to be governed, until the 31st December, 2009, by the provisions of the 1994 Law and the other relevant principles of law in force immediately prior to the date of commencement of the new Law, and*
> *(b) any such exemption from liability or indemnity –*
> *(i) shall, after that date, be deemed to be void only to the extent necessary to ensure compliance with section 157(1) or (2), as the case may be, and*
> *(ii) subject to that, may be read as if it were lawful to the fullest extent permitted by the new Law.*"

44. I accept that the starting point must be the New Law, not the Transitional Provisions. In any inconsistency between primary and secondary legislation it is axiomatic that the former trumps the latter. It does not, however, follow that contemporaneous secondary legislation cannot assist in the construction of primary legislation. *Hanlon v Law Society* 1981 AC 124 at 193-194.

45. Perpetual contended that the meaning of the New Law and transitional provision was clear:-
(i) If an exemption or indemnity is provided to a director before the 1st July 2008 it will continue to provide protection until 1st January 2010, but will not do so thereafter.
(ii) If an exemption or indemnity is provided to a director after 1st July 2008 it is void (i.e.) without legal effect.

(iii) Accordingly since the Directors took office only on 20th March 2009 and did not enjoy the benefit of the transitional provisions, section 157 precluded Perpetual from providing the exemption or indemnity on which the Directors seek to rely.

46. The contrary interpretation advanced by the Directors and Marlborough (and favoured by the Deputy Bailiff) is that:

(i) Perpetual provided an exemption or indemnity in its Articles from 16 October 2007 (the Article then being 153) which pre-dated 1st July 2008 and hence the Directors, albeit only appointed after 1st July 2008, enjoyed the benefit of the transitional provisions until 1st January 2010.

(ii) Their alleged breaches in July/August 2009 accordingly fell within such protected period which subsisted until 1st January 2010.

The rival contentions can be epitomised as a choice between interpreting the word *"provided"* as meaning *"provided to"* (Perpetual's construction) or *"provided by"* (the Directors and Marlborough's construction); or between adopting the Company's perspective or the Director's perspective of the meaning of "*provision"*.

47. For a number of reasons, while saluting Advocate Swan's forensic stamina and ingenuity, I prefer Advocate William's construction.

(1) the ordinary and natural meaning of *"provides"* is that something is <u>given</u> by someone to someone else (e.g. the phrase *"provision of goods facilities or services to the public"* in anti-discrimination legislation);

(2) an indemnity cannot be provided to a director by a company until he actually enjoys the benefit thereof. It can be offered to him by the company; but until he accepts it, it is not provided to him: (see *mutatis mutandis* the analysis of Bowen LJ in *Isaac's* case); an offer of provision is not the same as provision itself.

(3) Section 157(2) and (3) are indissolubly linked. Provision of an indemnity can be either <u>via</u> the medium of a company's articles or by a contract, free standing of those articles, (see Section 157(3)).

(4) Advocate Swan argued that since it is common ground that articles per se do not confer benefits on a director, it followed that "*provision*" in the statutory context meant only that an indemnity was set out in the articles. In my view "*provision*" in Section 157 (3) must bear the same meaning whether applying to the articles or to an independent contract i.e. that the director <u>enjoys</u> the benefit thereof (see (2) above). The purpose of Section 157 (3) read as a coherent whole is clear (see (3) above). There are two routes by which a director can enjoy the benefit of an indemnity: the reference to articles and contract embraces both, but in each it is a *sine qua non* that the director has accepted the benefit, not merely been offered it;

(5) Advocate Swan was, on analysis, blowing hot and cold; relying on contractual rights of the Directors in relation to Issue 1.1 but disclaiming them in Issue 1.2.

48. The Deputy Bailiff's own view on this issue was informed by his perception that so signal a change with its potentially adverse effect on directors required a transitional period to cushion its effect even after the New Law came into effect. But it could with equal force be contended that such directors' exemption and immunity was viewed by the legislature as obsolete, and that the New Law was intended to remove it promptly with only a limited transitional period for those who had enjoyed its benefit prior to the coming into effect of the New Law itself.

49. In any event, as Advocate Williams reminded us, the New Law contained Section 522 which provided, so far as material, as follows:

> *"Relief from liability for officers and auditors*
>
> *522. (1) If in proceedings for negligence, default, breach of duty or breach of trust against*
>
> *(a) an officer of a company,*
>
> *it appears to the Court that the officer or person is or may be liable but that*
>
> *(i) he acted honestly and reasonably, and*
>
> *(ii) having regard to all the circumstances of the case (including those connected with his appointment) he ought fairly to be excused,*
>
> *the Court may relieve him, either wholly or in part, from his liability on such terms and conditions as it thinks fit.*
>
> *(2) If any such officer has reason to apprehend that a claim will or might be made against him in respect of negligence, default breach of duty or breach of trust –*
>
> *(a) he may apply to the Court for relief, and*
>
> *(b) the Court has the same power to relieve him as it has under subsection (1)."*

This itself gave a cushion for or comfort to directors – an unqualified indemnity or exemption for directors (wilful default apart) being replaced by discretionary relief granted by the Court and tailored, if granted, to the circumstances of the individual case.

50. Advocate Swan also suggested that his construction provided equality of treatment for all directors, whether appointed before or after 1 July 2008. However, in my view, there was good reason for the legislation to differentiate between directors who had taken up office on the basis of an exemption or indemnity and might accordingly be thought deserving of a period of grace during which they (and the Company) could adjust in terms of insurance or otherwise to the new regime, and those who, eyes-open, accepted such office when the New Law was not only on the statute book, but in effect.

51. I appreciate that persons who might otherwise have become directors after 1st July 2008 might since that date be reluctant to do so if deprived of the traditional immunity but this would be so, in any event, at the end of any transitional period. It is true that, if my view of the limited reach of the transitional provisions be correct, a post July 1st 2008 – pre 1st January 2010 appointee as director of a company might lack the protection which his fellow pre - 1st July 2008 appointed directors enjoyed until the later date, but he (or she) always had the option to decline the office.

52. None of these factors relied on by Advocate Swan could in any event dislodge what was, in my view, the clear and consistent meaning of both the New Law and of the transitional provisons.

53. It was common ground that the New Law did not avoid indemnities otherwise enjoyed by Managers. Accordingly Advocate Williams accepted that if his submissions on Issue 1.1 were rejected, Perpetual's claim against Marlborough would necessarily fail.

Conclusion

54. The consent order at para 2 directed that the proceedings be stayed pending trial of the preliminary issues save for Perpetual's right to apply to amend its cause. Perpetual has not done so. For that reason, the Deputy Bailiff dismissed this action. Advocate Williams protested that this was wrong and he should have been given the opportunity of seeking to amend to plead wilful default against the defendants. On the basis of my judgment (if concurred with by my brethren and not appealed) Perpetual does not need to do so vis à vis the four Directors. In any event the Court can only deal with the preliminary issue on the basis of the current pleadings.

Since an application to amend has not in fact been made, the claim against Marlborough must be dismissed.

55. In summary Perpetual's appeal is allowed in respect of the Directors, but dismissed in respect of Marlborough.

56. I would only end by respectfully complimenting the Deputy Bailiff for the care with which he examined the issues before him, which spawned a series of sub-issues with which we, no doubt on account of his judgment, have not been troubled.

Sir John Nutting Bt, JA

I agree.

Sir Michael Birt, JA

I also agree.