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Has the statutory derivative claim fulfilled its objectives? The hypothetical director and CSR: Part 2

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Cases: [Kiani v Cooper \[2010\] EWHC 577 \(Ch\); \[2010\] B.C.C. 463 \(Ch D\)](#)
[Ilesini v Westrip Holdings Ltd \[2009\] EWHC 2526 \(Ch\); \[2010\] B.C.C. 420 \(Ch D \(Companies Ct\)\)](#)
[Stimpson v Southern Landlords Association \[2009\] EWHC 2072 \(Ch\); \[2010\] B.C.C. 387 \(Ch D\)](#)
[Franbar Holdings Ltd v Patel \[2008\] EWHC 1534 \(Ch\); \[2008\] B.C.C. 885 \(Ch D\)](#)

***Comp. Law. 76 Introduction**

This article follows on from the discussion on establishing a prima facie case and the mandatory bars in derivative claims.¹ First, the second stage of the test will be considered, covering the standard of proof and how the court as a hypothetical director is meant to analyse board decisions: is the test objective or subjective? An analysis will follow on corporate social responsibility and its relationship to derivative claims considering issues such as finance and internal and external responsibilities.

The second stage--section 263(3)

The second stage will become active if it becomes clear that some directors would seek to continue the claim, as opposed to those claims which no director would seek to continue.² *Franbar Holdings Ltd v Patel* demonstrates some key issues arising from the second stage, such as the standard of evidence required, are there any considerations under s.263(3) that may override others, and what is the nature of the test under s.263(3)(b), whether it be objective, subjective or both. Before analysing these points it will be necessary to establish a few facts from *Franbar* to aid in the discussion.

Medicentres (M) was a company wholly owned by Franbar (F). F then sold 75 per cent of M to Casualty Plus (C), along with F and C entering into a shareholders agreement, which granted F the right to sell the remainder of the shares or the right for C to call for them. Some time later Mr Patel (P) was appointed to the board by C to M and he was considered to be the catalyst of the disagreements between F and C. Some of the complaints F made included diversion of business opportunities for F; the removal of Mr Lalani (L); the failure of P and Dr du Plessis (D) to provide adequate financial information; the fact that P was considered to be unfit to act as a director owing to, among other things, his involvement in unlawful conduct concerning insolvent companies, and various other miscellaneous complaints.

F, at the same time, was pursuing a claim for unfairly prejudicial treatment and a claim for breach of a shareholders' agreement. They claimed actions taken by C, P and D were done with the aim of driving down the value of M's share price, leaving the remaining 25 per cent of F's shares to be purchased at a lower price.

The claim had to survive the second stage of the test where not all factors on the list have to be considered, just those relevant to the case. Section 263(3)(b) will be of particular importance in a case as it requires the judge to place himself in the position of a hypothetical director to assess the importance a person acting in accordance with s.172 would attach to continuing it. The court believed that a hypothetical director would consider a wide range of factors including: (1) prospects of success; (2) the ability of the company to make a recovery; (3) disruption to the business by having to concentrate on proceedings; (4) the costs of the proceedings; and (5) any damage to the company's reputation and business if proceedings were to fail.³ The court also looked at what evidence was required to pass the second stage and used the phrase "obvious breach of duty".

Obvious breach of duty?

The court in its assessment at the second stage threw up an interesting phrase, which indicates what the court's approach to derivative claims will be. In *lesini*, the court demonstrated that the second stage was not merely a case of establishing a prima facie case, and that something more would be required. Furthermore the court mentioned that they had to form a view on the strength of the claim in order to properly consider s.263(2)(a) and 263(3)(b), but that view can only be provisional, with the material it has before it, since the action is yet to be tried.⁴

In *Franbar*, the applicants believed the claim should be allowed because a hypothetical director would attach significance to continuing the claim, because otherwise the company would have no other way of claiming compensation. The court believed this to be troublesome:

“The complaints are not yet in a form in which the hypothetical director might be expected to conclude that there was an *obvious breach of duty*.”⁵

***Comp. Law. 77** It is possible to see this term “obvious breach” from two perspectives. First, by requiring there to be an obvious breach, it is possible to sift out the trivial claims. Secondly, obvious breach is a strict test which is overly burdensome on the claimant, and may lead to cases where meritorious claims are dismissed.

In *Franbar*, the court had already conceded that it was likely that the defendants P and D were to blame for the conduct complained of⁶ and that directors often will make partially informed decisions,⁷ but the judge was requiring the claimants to prove an obvious breach of duty. This links back to the earlier point that although the court did not throw this matter out under s.263(2)(a) they still attached little weight to continuing it under s.263(3)(b).⁸ Although a case at the trial stage may lead to different conclusions, to require the defendants to prove an obvious breach could in many circumstances deteriorate into a mini-trial. This also raises the question that if a breach of duty has been proved then it may be over-elaborate to go to court again and establish the same case. There are also circumstances where proving such breaches may be impossible, which this case can demonstrate. In *Franbar* P and D were accused of withholding financial information, which made it impossible for F to determine whether there had been a breach. It is possible that the court should have adjourned proceedings⁹ and made an order for the financial information to be released. However, the power of the courts to adjourn proceedings to enable evidence to be obtained is considered a particularly “thorny” issue as to disclosure and information asymmetries that can exist between large and small shareholders.¹⁰ Disclosure orders themselves can be problematic when concerning the length and cost of a trial. In *Kiani*, although the defendants had not produced any corroborative evidence, they claimed they would do in due course since they had not had the time to produce it so far.¹¹ The defendants, however, had had six weeks to prepare their defence and their motives have to reasonably be questioned as to why the evidence was taking so long to produce. It is possible that such a tactic was deployed to increase the length of the litigation to deter the claimants from proceeding, which is a dangerous precedent to start allowing in light of the objectives of the new claim.

Stimpson also hints at this strict test at the second stage. The court here mentioned that “some claims are stronger than others though none of the claims can be said to be more than realistically arguable”. It is debatable whether having a claim that is realistically arguable should be enough to allow a claim to proceed. Of course, each case is fact-sensitive and having only one realistically arguable claim against numerous trivial ones is unlikely to succeed, as seen in *Smith*.¹² The statement though in *Stimpson* suggests that even if you have all claims which are realistically arguable, this still will not be enough for your claim to proceed, as the courts would look for something beyond realistically arguable.

It may be that since *lesini* demonstrated that something more than establishing a prima facie case at the second stage is needed,¹³ the first stage is merely showing a realistically arguable case. Since the first stage merely requires evidence from the claimant, a claim at the second stage may become less than realistically arguable based on evidence from the defendants. In *Kiani* the defendants did not produce any evidence to support their defence and the claim was allowed. It could be argued that all the defendants have to do is show some rudimentary evidence to the contrary, for the courts to determine that a hypothetical director would not attach much weight to a claim since it is not obvious there was a breach. In *Franbar*, most of the evidence stemmed from the defendants' statements rather than strong hard evidence.

These cases demonstrate the unwillingness of the courts to order disclosure of “internal” documents and falls in line with pre-2006 case law,¹⁴ and also shows what Reisberg believed: that “litigants will still have to face up to traditional suspicions of the English courts towards derivative claims”.¹⁵ Having looked at the strict approach of demonstrating a breach at the second stage, this article will now look at the approach of the courts at the second stage and how the courts will assess relevant factors.

Hypothetical director: subjective v objective

A big element where there appears to be little academic discussion or agreement concerns the assessment under s.263(3) as to whether it is of an objective or subjective nature. Section 263(3)(b) is the one of most notable concern since all the other subsections may be considered in this assessment.

Hannigan believes that this test is for the court “to look at the matter from a subjective perspective of the hypothetical director acting to promote the success of the company”.¹⁶ Reisberg, however, reiterates the words of Lord Goldsmith:

“[T]he test of whether a claim is a sensible one to bring, which is what s263(3)(b) deals with, is objective, since, by definition, what is at issue is **Comp. Law. 78* whether the director acted properly. It is coupled with a series of tests which are designed to look at what the company actually wants.”¹⁷

It is not entirely clear from either statement as to how the hypothetical director is meant to act. Both statements appear to be in agreement that the assessment is one based on the actual company in question, not some abstract company. Section 172 itself is subjective under a test of good faith to promote the success of the company. Davies, however, notes a crucial difference between determining whether somebody has breached their duty of loyalty and the statutory derivative claim. In the former scenario the courts would have no power to interfere where the director had properly formed a good faith view; but in the latter the court has to formulate its own view as to how much weight a director would attach to continuing the claim.¹⁸

There are arguably three possible ways of assessing s.263(3)(b), although one possibility may branch off into two more. The first is a subjective approach, looking at whether that board would seek to continue the claim. The second is an objective approach, assessing the situation as an objective director about an objective company. Thirdly, it could be assessed as a dual objective/subjective where some elements would be subjective and some objective. It is arguable that this debate may branch off into two more possibilities as to whether you assess it subjectively first or objectively.

It is the final option which this author considers to be the correct approach; however, it is important to consider why it is not so in the first two options. A subjective approach is a plausible option but one which would place too much emphasis on the thoughts of the actual board. In *Mission Capital* the court noted that “[T]he section [s.263(3)(b)] refers to a notional director considering whether to continue a claim. It is of course not the actual board of the company.”¹⁹ Although the court will look at whether the company has decided to not pursue the claim, this would not be decisive as Lord Goldsmith showed that on an assessment it may reveal that the decision was in fact a bad one.²⁰

A blanket objective test would also be ill advised as it would not consider the individual needs of the company and it would impose a blanket standard for all companies to adhere to, which would not be possible for any number of practical reasons. For example, Marks & Spencer and Aldi are both in the same sector but do not conduct business in the same way. Marks & Spencer are more likely to be concerned about environmental issues owing to their Plan A campaign, so a claim on environmental issues may have a higher chance of success once these individual circumstances are taken into account.

This leaves us with the option of a joint subjective/objective test. Keay and Loughrey²¹ state that the test is objective in assessing the best interests of the company. They also state that the focus is on that company and the court must consider factors specifically related to that company such as character, size, ability to satisfy an order and so forth.

The problem though with this approach is to how you effectively assess it. On one hand the court could set a minimum objective standard but if the company's standards are above the minimum then the subjective approach would apply, similar to the test under s.174. On the other hand one could just assess the considerations one by one in no particular order. Lord Goldsmith stated that the factors set out are a “mixture of the objective and the factual and we expect the court to consider them together.

It would not be a question of taking it step by step or in a particular order".²²

It seems that the only objective consideration is s.263(3)(b), which is only analysed in terms of the legal validity of the claim and nothing else except in a clear case where commercial considerations may be considered. All factors are then subjective under s.263(3)(b). Some legal issues may prove for and against bringing a claim. These factors are assessed subjectively and the judge merely weighs up the good against the bad under s.263(3)(b) in deciding whether to attach weight to the claim based on its legal merits. Unless that decision taken by the company is a bad one as demonstrated by Lord Goldsmith the court would reassess the situation objectively. Once these factors have been determined the court will balance the pros and cons to determine its own objective decision on whether to allow a claim. That decision is mainly made up of subjective analysis.

It is unclear how you would define a bad decision, and it could possibly encompass commercial misjudgments. The court's initial approach can be seen from the assessment of s263(3)(e)-(f) in *Franbar*. If we remember, in *Franbar*, P had previous unlawful conduct involving insolvent companies, yet the majority shareholders were happy for him to continue in office. On a subjective assessment then you would not attach weight to continuing it. Objectively speaking, though, this could be seen as a bad decision. To allow P to continue in office, after already conceding that he is likely to be of blame for the conduct complained of, would not be acting in accordance with s.172. Also the court placed great emphasis on the availability of another remedy.²³ This too could be construed as a bad decision, since that would most likely terminate the minority's involvement in the company under s.996(f).²⁴ The court concluded that since there was the option of an alternative remedy and they "**Comp. Law. 79** were happy with P to continue in office, a director would not attach much weight to continuing the claim in accordance with s.172.²⁵ As we can see, all the relevant factors to s.263(3)(b) were assessed subjectively and within a legal scope²⁶ and the same can be seen from *lesini*.²⁷

Arguably the court would have reached the same conclusion on an objective assessment, but it is unclear whether this was the case in *Franbar*. Since there was the shareholders' agreement for the minority's shares to be purchased anyway, it is likely the courts would have reached the same conclusion. It would be unlikely after the events that had occurred that the company would be able to make a recovery and the shares should now be purchased at a fair price. The court, however, gave no mention to this line of objective commercial reasoning. Kershaw noted from *Franbar* that the court actually stepped back from assessing any of these commercial considerations,²⁸ and the same was so in *lesini*. The most probable approach will be for the courts to stick to a subjective assessment and only assess the situation objectively and attach weight to the claim under s.263(3)(b) if the decision-making process was done through unlawful conduct amounting to a breach of duty, negligence etc.²⁹; or the company did not express an opinion; or the company has not provided evidence to the contrary³⁰; and even when this is so the assessment will still stay within the legal boundaries.³¹ This is because to objectively assess commercial matters, where the company has already substantiated a view with some evidence, would be contrary to the Law Commission's guiding principle of not second-guessing directors.³²

The difficulty that the court would face in assessing commercial considerations would be vast. This can be demonstrated by the comparison of s.263(3)(e) and s.263(4). Under s.263(3)(e) the court must *take into account* whether the company has decided not to pursue the claim, and s.263(4) the court must have *particular regard* to the views of disinterested members. How the court is meant to effectively assess who takes priority with no guidance other than evidence before them could result in an infinite amount of variables. Even if the court were to decide which section takes priority on a commercial reasoning, it would then fall on the court to decide whose views from that group take priority. For example, two disinterested shareholders may have opposing views and it is not for the court to say one has priority merely based on their shareholding. It may also be impossible to tell whether the disinterested shareholders have ulterior motives.³³

The only time we really see an objective assessment is: first, when there is unlawful activity etc.; secondly, once all the legal issues under s.263(3)(b) are considered the judge must decide how much weight to attach to the claim; and thirdly, once all the relevant subsections and any other considerations have been assessed the court will apply its objective discretion as to whether to allow the claim. All the elements of the latter two, however, are fundamentally subjective. It may be so then that all considerations should be assessed under s.263(3)(b) itself to determine how much weight should be attached to a claim, but case law does not appear to be developing in that way.³⁴

These points do provide support for Kershaw's view that judges will look to stay within the confines of the law despite being given the potential to assess commercial considerations. Even where

commercial considerations are considered it is still argued that the court will return to how much weight a director would place on continuing a claim based on all the factors in front of them. With cases being decided on their legal merits under s.263(3)(b), this goes against the original ideas of the Commission not to set threshold requirements and having cases decided on their legal merits.

From this judgment it appears that the courts will assess factors subjectively first, and only if that decision was a bad one to the extent of negligence or unlawful conduct will the courts assess the factors objectively and perhaps attach weight to the claim. Negligence itself may include forgetting to consider certain issues such as corporate social responsibility, which we shall look at later. Proving a breach of duty or negligence at this stage, however, comes with its own problems, as we have already discussed, except in cases of absolute certainty, which we can start to see from *lesini* and *Stimpson*. It seems that the only time a court will attach weight to the claim under s.263(3)(b) is a solid legal claim against the defendants' reasoning; when the defendants have not expressed a view on the matter; or have not provided evidence to the contrary. Lord Goldsmith was correct that all factors should be considered together in no particular order, but arguably all factors are considered under the heading of s.263(3)(b) and are fundamentally subjective.

Corporate social responsibility

Interesting issues have arisen out of *Stimpson* concerning stakeholder interests and cost factors. *Stimpson* involved an organisation limited by guarantee that was not-for-profit, and so considering the interests of the ***Comp. Law. 80** company under s.172 would be slightly different from assessing a company limited by shares. The applicant was pursuing a derivative claim on the basis of a merger and the appointment of a board member was approved via a meeting that lacked quoracy, as well as certain breaches of fiduciary duties. Permission was refused for several reasons, but most notable was the factor of injustice to employees and the issue of cost.

Stakeholder interests form an important part of the discussion under *Stimpson*, first, owing to the way it was analysed in court and, secondly, owing to the fact that employees' interests were considered. For the purposes of discussion, the latter point will be discussed as if the employees would have benefited from the merger not progressing, considering it in the light of the cost factor.

Stakeholder interest

The factors under s.263(3) are not exhaustive and in *Stimpson* the judge noted that it was important to consider the interests of the employees:

"[B]ecause Section 263(3) is not exhaustive of the matters that require to be considered, in my judgment the effect of what is proposed on the former employees of the first defendant is something that I am entitled to take into account."³⁵

The issue raised here is that there is a notable separation between the interests of employees and s.263(3)(b). It is argued that employees' interests should already have been considered under s.263(b) and not be something extra, since those interests can be found under s.172(b). To suggest a separation could mean that the court's approach to stakeholder interests or corporate social responsibility (CSR)³⁶ in derivative claims may merely be at its discretion, and when considering s.172 the court will assess it in terms of benefiting members as a whole or, more precisely, the majority. This approach can be seen as similar to whose interests the courts will favour when a company close down business.³⁷

The rationale behind this may be that derivative claims are minority protection, not there to defend the interests of employees. If employees' interests are of concern it should be for the majority to address these issues. Shareholder rights are merely rights of participation on the terms of the articles of association³⁸; to allow them to start deciding issues of CSR or which stakeholders to consider through derivative claims may fly straight in the face of majority rule. One would argue that this is quite unlikely though; there are quite foreseeable circumstances where the majority may act to the detriment of stakeholders, that is to the detriment of the company. Since breaches of duty are now capable of being pursued as a derivative action, it is more likely that a minority may pursue one to protect stakeholders. This separation by the court would in theory make that more difficult. This case may provide sprouting evidence that judges will still be reluctant to allow claims to proceed.

It is also more likely that courts will throw out claims if those stakeholder interests are external to the company. These interests may be those like human rights, environment, community, etc., whereas

the interests of employees and creditors are internal. It may have been so that if this separation was deliberate and the stakeholder interests at hand were external to the company, the court might have not deliberated on them at all. It is argued that owing to the impact of globalisation, these external issues need to be considered further by companies and courts alike. To disregard external CSR issues would be contrary to changing social standards and public opinion.³⁹ It has even been quoted by Warren Buffett⁴⁰ that “[w]e can afford to lose money -- even a lot of money. We cannot afford to lose reputation -- even a shred of reputation”.⁴¹ There are, however, examples of courts considering these external CSR issues, but not in the context of derivative claims.⁴² This is seen perhaps as a move beyond the enlightened shareholder approach attempted in the Companies Act and more closer to a pluralist approach of profit sacrificing social responsibility.

In *Kiani* the judge though made no indication of a separation of s.263(3)(b) and the subsections under s.172.⁴³ However, the subsection here was (f), to act fairly between members, and does not concern CSR. This then may not clarify whether there is a separation of stakeholder interests in a s.263(3)(b) assessment. CSR though is likely to be considered under a s.263(3)(b) assessment in the balancing act the courts have to perform. How much weight CSR issues will be given shall now be the focus of the discussion.

Financial considerations v stakeholders

Davies argues that financial terms alone will not determine what is meant by success under s.172--other factors will be relevant in that assessment.⁴⁴ This adds weight to the previous argument that stakeholder interests should be considered under s.263(3)(b) since Davies demonstrates that success does not solely mean financial gain. On the current facts of *Stimpson*, financial ***Comp. Law. 81** considerations and employee concerns were both reasons for not continuing the claim. For the purposes of discussion one will consider the hypothetical situation of employees benefiting from the derivative claim succeeding, but the cost element remaining the same.

Financial consequences are always going to be of concern for the courts in derivative claims as well as in other areas,⁴⁵ but whether this factor could trump any other consideration under s.263(3)(b) or even s.263(3) generally, we shall consider here.⁴⁶

Stimpson demonstrated that if the claim had been worth £5.3 million as claimed by the applicant, it is likely a person acting in accordance with s.172 would consider it appropriate to continue the claim. The court also noted in a claim for £2,000 no director acting in accordance with s.172 would seek to recover that amount. The court determined that the claim was worth around £200,000 and a hypothetical director in the right circumstances might seek to recover such a sum. However, litigation costs would be around £350,000 per side and there was a chance that around £70,000 would be irrecoverable for the successful party. Ignoring the other factors relevant to this case, it is questionable whether the court would have allowed the case to proceed if the employees would have benefited from it.

Evidence suggests that companies are increasingly concerned with CSR issues⁴⁷ and the Government is encouraging companies to consider them.⁴⁸ In addition, there is also a plethora of empirical evidence to suggest CSR positively affects market performance.⁴⁹ One main question here is whether or how the courts will respond to this.

Previous cases⁵⁰ have shown a judicial willingness to accept CSR issues over maximising profits. Bowen L.J. stated:

“A railway company, or the directors of the company, might send down all the porters at a railways station to have tea in the country at the expense of the company. Why should they not? It is for the directors to judge, provided, it is a matter which is reasonably incidental to the carrying on of the business of the company ... The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company.”⁵¹

Here we can see early signs of judicial acknowledgement of CSR issues benefiting the company without necessarily maximising company wealth in the short term. Beyond Davies' earlier comments on s.172, Keay gave further support to the notion, showing that beyond maximising the entity it is important to sustain it as a going concern.⁵² Alternatively there are cases like *Parke v Daily News*⁵³ where payments to employees were held not in the interests of the company when the company was being wound up, and it is plausible that judges may take maximising shareholder wealth as the priority in derivative claims over CSR issues. It is likely, based on what has been discussed, that at

least internal CSR issues will be considered in derivative claims, based on previous rationale, but external CSR issues may be slightly harder to argue against costs, though it is important to remember cases such as *Evans*.⁵⁴

In *Stimpson*, on our slightly adjusted facts, it could be quite difficult in determining whether a claim should be allowed to proceed. The cost to the company would be over £100,000, but it would save three employees. Deciding this would depend on all the relevant caveats attached to these two factors--questions such as, is losing three employees worth £100,000, what are the roles of those employees, how large is the organisation and could it operate without those three employees? Based on the information available it would be hard for this author to reach a firm conclusion, but what can be said is that based on previous case law, s.263(3)(b) and s.172 it is likely that judges will reasonably consider CSR issues in a derivative claims assessment. It is important to remember though from the discussion on s.263(3) that if the defendant produced commercial reasoning for not considering the employees an objective assessment would unlikely take place.

These cases are arguably codified now under s.172, for example *Welfab, Re*, where they consider the interests of the employees was acting in accordance with s.172(a) and (b). Disregarding the employees would have made a short-term gain, but it most likely would have harmed the business in the long term. Short-term interests were dropped from the subsections of s.172 in the final draft of the Companies Act, although they were initially drafted into the first three versions.

***Comp. Law. 82** It can reasonably be said that in the right circumstances CSR issues can outweigh those of cost. Furthering that argument, it will also be more likely in cases concerning internal CSR. Courts must be quick to respond to companies' needs, such as their desire to engage in higher levels of CSR, and to tie them down to outdated concepts of mere profit maximisation may be severely detrimental to the company and the economy. Academic opinion seems to argue that the courts need to consider CSR, but in reality outweighing the commercial consideration of cost would most likely require a legal argument to the contrary. This in essence, as the quote from Buffett showed, may be contrary to the needs of corporations. Hopefully the separation of the two sections is merely a judicial hiccup, and is not an intentional firm precedent. What would be advisable for directors is to keep accurate records of how they actively consider the wide range of issues of their decisions, showing that they considered CSR issues and why they did or did not concern them in their final decisions.

Conclusion

Arguably the new statutory derivative claim has fallen short of achieving its objectives. Placing derivative claims on a statutory footing has made the claim more transparent, but the courts' indifferent approach in how they will assess relevant considerations or what process they will follow dents the transparency that the statutory claim brings. Whether it be skipping the first stage, not hearing a prima facie case or combining s.263(2)(a) and s.263(3), the process a court will follow is not clear.

The claim is, however, more flexible. The court is no longer tied down to the rigid approach of years gone by and the derivative claim can truly flourish to encompass new situations. *Kiani* is our first example of a case being caught by the new derivative claim. Most of the claims relate to breach of duty, which previously would not be a case for bringing a derivative claim. Although the claim has only been allowed so far down to disclosure, it is foreseeable that this claim will continue to the next stage.

While the claim is flexible, it appears that Roberts and Poole were correct that the system is based on judicial control and thus will not result time or cost saving. Most cases are still fundamentally decided on their legal merits rather than deciding on the company's best interests. Although it was established in *Iesini* that there was a mandatory bar to the case, that assessment still took four days and in *Kiani* a day was spent in court. One could argue that where there is a clear case of breach of duty, negligence, etc. to bring a derivative claim, the courts are able to fast-track past unnecessary formalities as in *Stimpson* and *Franbar*; however, it seems that defendants can still slow the process down employing negative tactics, as in *Kiani*, by failing to produce corroborative evidence despite having six weeks to do so.

Directors do still have the upper hand in these claims as well, which was the Commission's aim.⁵⁵ The cases so far demonstrate that the so-called balancing act of meritorious claims against directors' good faith decisions is skewed heavily towards directors. Requiring shareholders to show obvious breaches of duty or disregarding claims on little evidence from defendants, along with all the natural safeguards in place to deter a claim being brought, the shareholder faces a mighty challenge to be successful in

a case that he genuinely brings. Even by making the claim more transparent this arguably has favoured the directors, as Reisberg and Lowry point out:

“Imagine a bona fide shareholder who genuinely contemplates taking an action and reads through this list. Faced with these complexities, the average shareholder will often give up in despair at this early stage.”⁵⁶

With regard to CSR and derivative claims case law would have to develop further to draw any firm conclusions, but with cases few and far between this may prove difficult. However, in other areas of company law we have seen the courts acknowledge and favour the interests of stakeholders and thus the company as a sustainable entity over the interests of the current shareholders. Whether this will still be the case in derivative claims is unclear, especially in light of *Stimpson*, and these interests may be easily defeated in a claim if the defendants can provide evidence to the contrary. In all likelihood CSR issues will be considered by a court if the claimant can establish a direct benefit to the company through bringing a claim. This itself will be easier in claims concerning internal rather than external CSR matters.

There still seems to be a firm reluctance for courts to allow derivative claims to proceed.⁵⁷ They remain a weapon of last resort,⁵⁸ and not some race to the court house as described in the United States.⁵⁹ Whether it is favourable to continue in the same vein of deterring claims where there is a breach of duty or begin to allow more claims where there may not be a breach would require further research. For now a derivative claim does not appear to have altered tremendously and bringing a successful claim, with little incentive to do so, is unlikely.

Comp. Law. 2011, 32(3), 76-82

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1. D. Gibbs, “The Statutory Derivative Claim: Has the Statutory Derivative Claim Fulfilled its Objectives? A Prima Facie Case and the Mandatory Bar (Part 1)” (2011) 32 *Company Lawyer* (forthcoming).
 2. *Franbar Holdings Ltd v Patel* [2008] B.C.C. 885 Ch D at [30]: “[T]his is one of those cases in which there is room for more than one view. Directors are often in a position of having to make what is no more than a partially informed decision ... it is my view that there is sufficient material for the hypothetical director to conclude that the conduct of M’s business by those in control of it had given rise to actionable breaches of duty. As it seems likely that Mr Patel and Dr du Plessis were behind much of that conduct, I cannot be satisfied that a hypothetical director acting in accordance with s172 would conclude that the case advanced was insufficiently cogent to justify continuation of a claim.”
 3. *Franbar* [2008] B.C.C. 885 at [36].
 4. *Ilesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch); [2010] B.C.C. 420 at [79].
 5. *Franbar* [2008] B.C.C. 885 at [37].
 6. *Franbar* [2008] B.C.C. 885 at [30].
 7. *Franbar* [2008] B.C.C. 885 at [36].
 8. Gibbs, “The Statutory Derivative Claim (Part 1)” (2011) 32 *Company Lawyer* (forthcoming).
 9. Companies Act s.261(3)(b).
 10. A. Reisberg, *Derivative Actions and Corporate Governance* (Oxford: OUP, 2007), p.144.
 11. *Kiani v Cooper* [2010] EWHC 577 (Ch); [2010] B.C.C. 463 at [30].
 12. *Smith v Croft (No.2)* [1988] Ch. 114 Ch D.
 13. *Ilesini* [2009] EWHC 2526; [2010] B.C.C. 420 at [79].
 14. *Arrow Trading and Investments v Edwardian Group Ltd* [2004] EWHC 1319 (Ch); [2004] B.C.C. 955--disclosure of certain financial information going beyond the standard disclosure requirements was argued to be very burdensome.
 15. Reisberg, *Derivative Actions and Corporate Governance*, 2007, p.144.
 16. B. Hannigan, *Company Law*, 2nd edn (Oxford: OUP, 2009), p.456.
 17. Reisberg, *Derivative Actions and Corporate Governance*, 2007, p.156.
 18. P. Davies, *Gower and Davies: Principles of Modern Company Law*, 8th edn (London: Thomson/Sweet & Maxwell, 2008), p.618.
 19. *Mission Capital Plc v Sinclair* [2008] EWHC 1339 (Ch); [2008] B.C.C. 866 Floyd J. at [38].
 20. *Hansard*, HL, Vol.679, col.GC29 (February 27, 2006).
 21. A. Keay and J. Loughrey, “Something old, something new, something borrowed: an analysis of the new derivative action under the Companies Act 2006” [2008] L.Q.R. 469, 492.
 22. *Hansard*, HL, Vol.679, col.GC26 (February 27, 2006).
 23. *Franbar* [2008] B.C.C. 885 at [54].
 24. Reason being that it would not be wise to allow people to continue in business together who have to settle disputes in court.

25. See A. Keay and J. Loughrey, "Derivative proceedings in a brave new world for company management and shareholders" [2010] J.B.L. 151--Keay and Loughrey appear to agree with the view that an objective assessment would probably lead to the opposite conclusion on those individual facts.
26. *Franbar* [2008] B.C.C. 885 at [54].
27. *Iesini* [2009] EWHC 2526 (Ch); [2010] B.C.C. 420 at [102].
28. D. Kershaw, *Company Law in Context: Text and Materials* (Oxford: OUP, 2009), p.560.
29. *Stimpson v Southern Landlords Association* [2009] EWHC 2072 (Ch); [2010] B.C.C. 387--here there was an issue as to quoracy, which meant some weight was attached to continuing.
30. As in *Kiani* [2010] EWHC 577 (Ch) ; [2010] B.C.C. 463 at [30]--no corroborative evidence was substantiated by the defendant.
31. *Stimpson* [2009] EWHC 2072; [2010] B.C.C. 387--although there was an issue of quoracy the claim wasn't beyond realistically arguable.
32. Law Commission, *Shareholder remedies: a consultation paper* (The Stationery Office, 1996) Consultation Paper No.142, para.14.11(iii).
33. J. Lowry and A. Reisberg, *Pettet's Company Law: Company and Capital Markets Law*, 3rd edn (London: Pearson, 2009), p.237.
34. *Iesini* [2009] EWHC 2526 (Ch) ; [2010] B.C.C. 420--here all subsections were considered separately.
35. *Stimpson* [2009] EWHC 2072; [2010] B.C.C. 387 at [37].
36. CSR is loosely described as those activities outside the company's main objectives, such as activities concerning the interests of employees, community, environment, etc., and stakeholders are those people to whom directors do not directly owe a duty but still have a stake in the company.
37. *Parke v Daily News Ltd* [1962] Ch. 927 Ch D--courts were reluctant to let other people's interests prevail over shareholders, in this case the employees.
38. *Prudential Assurance Co Ltd v Newman Industries Ltd (No.2)* [1982] Ch. 204 CA (Civ Div).
39. See A. Adeyeye, "The limitations of corporate governance in the CSR agenda" (2010) 31 *Company Lawyer* 114.
40. CEO of Berkshire Hathaway, a conglomerate holding company in the US.
41. C. Dezzo, "Scapegoating and Firm Reputation" (September 2009), at <http://ssrn.com/abstract=1473207> [Accessed December 27, 2010].
42. *Evans v Brunner Mond & Co Ltd* [1921] 1 Ch. 359 Ch D--concerning an act that was argued ultra vires because any benefit to the company was too indirect and the cost was substantial was denied by the court and external CSR issues were favoured.
43. *Kiani* [2010] EWHC 577 (Ch); [2010] B.C.C. 463 at [43].
44. *Gower and Davies: Principles of Modern Company Law*, 2008, p.618.
45. *Evans* [1921] 1 Ch. 359--although not a derivative claim, a rare example of external CSR trumping cost where donations to benefit the community were considered large, almost to the extent of profit sacrificing, but Eve J. stated that the respondents had proved the donations would directly benefit the company as well.
46. *Hansard*, HL, Vol.679, col.GC25 (February 27, 2006)--Lord Goldsmith: "We expect the court, in exercising its discretion, to take into account all the factors set out; they are a mixture of the objective and the factual and we expect the court to consider them together. It would not be a question of taking it step by step in a particular order."
47. For example, Marks & Spencer's "Plan A" (environment); Tesco's "Computers for Schools" (community); PriceWaterhouseCooper's "Educating Children in Darfur" (human rights). Even small companies are engaging more in CSR (although generally on a smaller scale), for example, Red Gate Software's "competitive moustache growing" (community) or Practicus, a new company, which spent £142,000 on events for employees last year (employees).
48. For example, Companies Act 2006 s.172 or Employment Rights Act 1999 implementing the minimum wage. See also C. Paul and D. Siegel, "Corporate Social Responsibility and Economic Performance" (January 2006), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=900838&rec=1&srcabs=276699 [Accessed December 28, 2010]--data from the US demonstrated that government encouragement via legislation was beneficial in promoting better standards.
49. For example, H. Bedi, "Financial Performance and Social Responsibility: Indian Scenario" (October 2009), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1496291 [Accessed December 28, 2010]; G. Dowell, S. Hart and B. Yeung, "Do Corporate Global Environmental Standards Create or Destroy Market Value?" (2000) 46(8) *Management Science* 1059.
50. *Hampson v Price's Patent Candle Co* [1876] 45 L.J. Ch. 437; *Welfab Engineers Ltd, Re* [1990] B.C.L.C. 833 Ch D; *Evans* [1921] 1 Ch. 359.
51. *Hampson* (1876) 45 L.J. Ch. 437.
52. A. Keay, "Ascertaining the Corporate Objective: an Entity Maximisation and Sustainability Model" (2008) 71 M.L.R. 663.
53. *Parke v Daily News* [1962] Ch. 927 Ch D.
54. *Evans* [1921] 1 Ch. 359.
55. Law Commission, *Shareholder remedies: consultation*, 1996, Consultation Paper No.142, para.4.6.
56. *Pettet's Company Law: Company and Capital Markets Law*, 2009, p.237.
57. M. Siems, "Private Enforcement of Directors' Duties: Derivative Actions as a Global Phenomenon" UEA LAW WPS 2010-MS-1 at <http://ssrn.com/abstract=1699353> [Accessed January 24, 2011]--Siems provides a comparative account of derivative actions documenting key problems for enforcing directors' duties and the global diversity of the action.
58. *Hansard*, HL, Vol.679, col.GC4 (February 27, 2006).
59. D. Branson, *Corporate Governance* (Charlottesville, Virginia: Michie, 1993), p.591.

