
13/5/10

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

**FSD 48/2009**

**IN THE MATTER OF THE COMPANIES LAW (2007 REVISION)**

**IN THE MATTER OF FREERIDER LTD.**

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| **BETWEEN:** | **ADRIANUS JOHANNES HEINEN** | **PETITIONER** |
| **AND:** | **PIETER LE COMTE** | **RESPONDENT** |

**Coram**: The Hon. Mr. Justice Angus Foster, QC

**Appearances**: For the Petitioner – Mr. Jonathan Crow QC
with Ms. Katie Brown of Appleby

For the Respondent – Mr. Alan Turner
with Ms. Rowena Lawrence both of Turner and Roulstone

**Heard**: 20th, 21st, 23rd, 26th and 27th April 2010

## REASONS FOR WINDING UP ORDER

1. On 13th May 2010, after a 5 day hearing in late April 2010, I made an order for the winding up of the company, Freerider Ltd. ("Freerider") on the ground that it was just and equitable to do so. I also appointed Joint Official Liquidators. These are my reasons for doing so.

2. The petition to wind up Freerider was on just and equitable grounds pursuant to section 92 (e) of the Companies Law (2007 Revision), now the 2009 Revision, ("the

Law"). The petitioner, Mr. Adrianus Johannes Heinen ("Mr. Heinen") is one of only two voting (Class A) shareholders of Freerider. The petition is opposed by the only other voting shareholder, Mr. Pieter Le Comte ("Mr. Le Comte").

3. In a Ruling dated 11th November 2009 I directed, pursuant to O.3, r.11 (2) of the Companies Winding Up Rules 2008, that Freerider should not be able to participate in these proceedings and should be treated merely as the subject matter of the proceeding. I further directed that the proceedings should be treated as *inter partes* proceedings between Mr. Heinen as petitioner and Mr. Le Comte as respondent and that although Freerider should remain formally a respondent it should be only be on a nominal and passive basis. Accordingly the dispute as to whether Freerider should be wound up is between Mr. Heinen and Mr. Le Comte.

4. As I have said, the hearing of the petition took 5 days. It involved oral evidence from 2 witnesses from the Netherlands by video link, Mr. Hans Van der Ven ("Mr. Van der Ven") and Mr. Arend Van der Sluis ("Mr. Van der Sluis") and from Mr. Heinen and Mr. Le Comte, both of whom were examined and cross- examined at length. I was also referred to a number of affidavits; 4 by Mr. Heinen, 3 by Mr. Le Comte, 2 by Mr. Van der Ven and 1 by Mr. Van der Sluis, which were taken as their respective evidence in chief. A substantial amount of correspondence and a number of documents were exhibited to the affidavits of Mr. Heinen and Mr. Le Comte and I was also referred to other correspondence which had been produced on discovery in the proceedings in New York which are referred to below. In addition I was referred to various affidavits by other deponents, as well as pleadings, reports to the court,

records of evidence and rulings given in other legal proceedings, particularly in the Netherlands, to which I have given such weight as I have considered appropriate in the circumstances.

**Background**

5. There is a substantial history to the relationship between Mr. Heinen and Mr. Le Comte which I was taken through in considerable detail. The interpretation and effect of the several agreements which they entered into early on (July 2003) and of their actions and communications later, particularly since about mid 2005, are the subject of disagreement and dispute. However, I do not think it is necessary for me to rehearse the factual background in exhaustive detail. I shall endeavour to summarize it as succinctly as I can and comment on it, focusing on those aspects which I consider to be of most relevance.

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

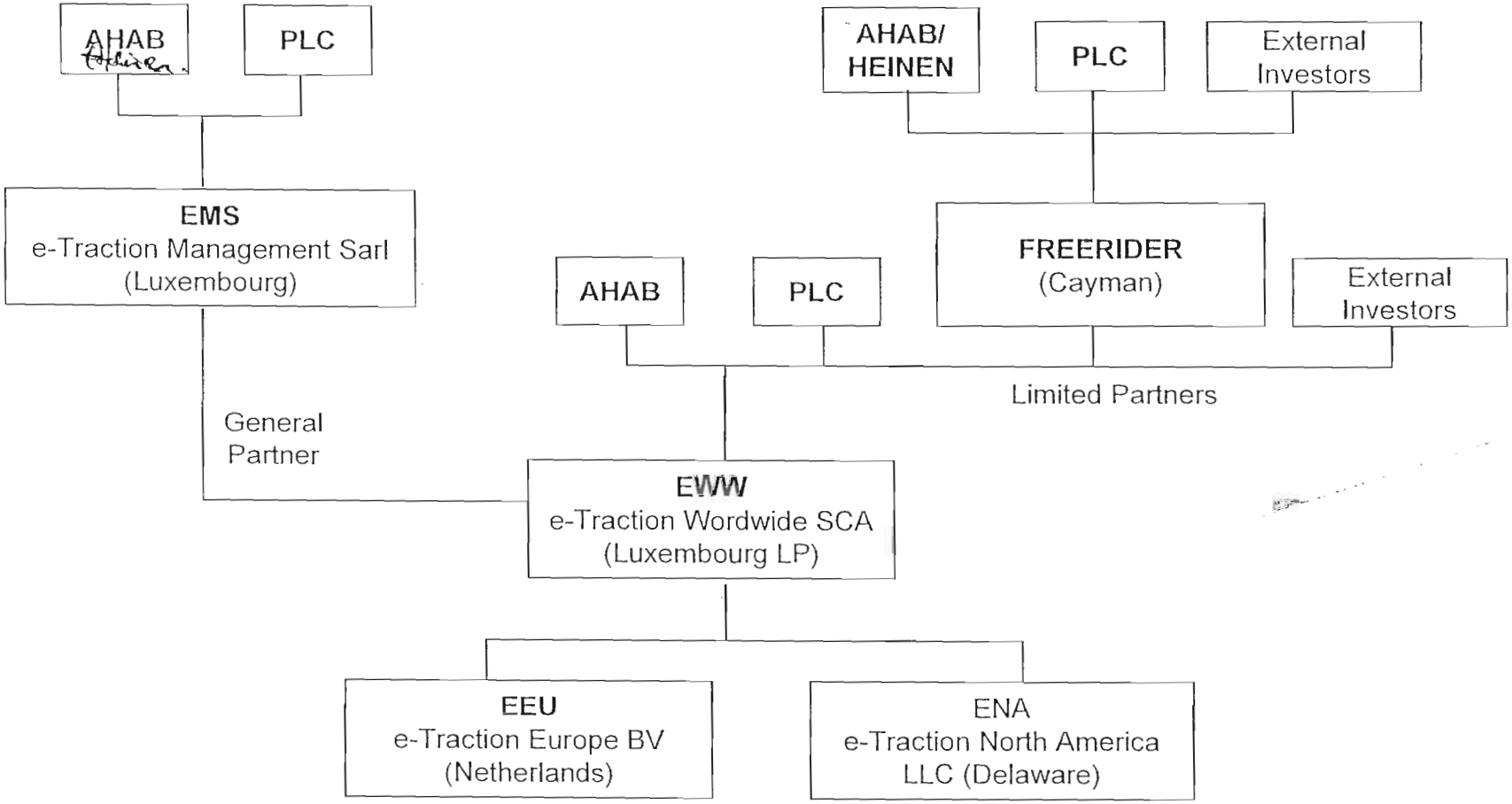
vehicle, whether a car, bus or truck, at high efficiency, saving approximately 40% to 50% of the energy currently required to propel a normal vehicle. It is a complete, integral unit but it also requires a specialized energy system with associated computer software to operate it. It enables a vehicle 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 cost 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. It seems to clear to me on the evidence, that later this was also because he saw the potential of Mr. Heinen's invention and anticipated significant financial return from investment in it within a relatively short time. 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 investment 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.

9. It was left to Mr. Le Comte to set up a structure to give effect to this joint venture and he devised, with assistance of lawyers in New York, a structure comprising of a number of companies, including Freerider, and a limited partnership. Mr. Heinen said in evidence that, as he was "the technical man and not the commercial man", he left it to Mr. Le Comte to do whatever he thought was appropriate in relation to the corporate structure and any necessary documentation. He said that he was busy developing TheWheel and that he trusted Mr. Le Comte completely to do what was right for both of them. Both Mr. Heinen and Mr. Le Comte described the other as his "best friend" at that time and the evidence of Mr. Van der Sluis in his affidavit was that at that stage he did not feel, as an investor in Mr. Heinen's original business, able to interfere in the arrangements between Mr. Heinen and Mr. Le Comte because Mr. Le Comte was Mr. Heinen's best friend. For convenience a diagram of the structure set up by Mr. Le Comte is set out below.


AHAB
PLC
AHAB/
HEINEN
PLC
External
Investors
EMS
e-Traction Management Sarl
(Luxembourg)
FREERIDER
(Cayman)
AHAB
PLC
External
Investors
Limited Partners
General
Partner
EWW
e-Traction Wordwide SCA
(Luxembourg LP)
EEU
e-Traction Europe BV
(Netherlands)
ENA
e-Traction North America
LLC (Delaware)

10. Mr. Heinen's business company, SPI, was restructured and its shares were transferred to a Luxembourg limited partnership, e-Traction Worldwide SCA ("EWW"). Its directors were Mr. Heinen and Mr. Le Comte (on the diagram designated by the initials PLC) with Mr. Le Comte as CEO. EEU in turn was now owned solely by EWW, which is a Luxembourg limited partnership. EWW also owned e-Traction North America LLC ("ENA"), a Delaware limited liability company, incorporated in anticipation of marketing TheWheel in North America, which has never really carried on business. The general partner of EWW is a Luxembourg company, e-Traction Management Sarl ("EMS") of which the shareholders are Mr. Le Comte and Mr. Heinen's holding company AHAB. The directors of EMS were again Mr. Heinen and Mr. Le Comte with Mr. Le Comte again the CEO. The limited partners of EWW are Freerider, along with AHAB, Mr. Le Comte and the Investor Group, who invested substantially once the structure was in place. The shareholders of Freerider, which was incorporated as a Cayman Islands company in June 2003, are Mr. Heinen or AHAB (there is a dispute over which, as explained below), Mr. Le Comte and the Investor Group.

11. Mr. Le Comte also produced, with the aid of the New York lawyers, several agreements, which are governed by New York law. The most significant of these for present purposes is a shareholders agreement relating to Freerider (and EMS) ("the First Shareholders Agreement"). It is dated 19th July 2003 and the parties to it are Freerider, EMS, Mr. Le Comte and Mr. Heinen. Mr. Heinen and Mr. Le Comte are described as the "Managers". Mr. Le Comte relied very heavily upon the provisions

of the First Shareholders Agreement in his opposition to the Petition particularly Section 1 which provides as follows:

> *SECTION 1. 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 EWS, in its capacity as general partner of EWS, to take all necessary and desirable actions within its control, in each case in order to cause:*
>
> *(1) with regard to any technical issue pertaining to the intellectual property of either of 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*
>
> *(2) with regard to all other business or legal issues of Freerider and 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 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 Le Comte in his sole discretion".*

The First Shareholders Agreement also includes provisions restricting the sale or other transfer of shares in either Freerider or EMS by a Manager without the prior written consent of the other Manager, other than to a spouse or lineal descendants. It

also provides, that the agreement is governed by and to be construed in accordance with the laws of the State of New York and has a jurisdiction clause in favour of the courts of New York subject to a proviso that issues relating to the internal corporate governance of Freerider are to be governed by the corporate law of the Cayman Islands and issues relating to the internal corporate governance of EMS are to be governed by the limited liability company law of Luxembourg. The First Shareholders Agreement was signed on behalf of both Freerider and EMS by Mr. Le Comte (presumably as CEO) and signed by Mr. Le Comte and Mr. Heinen personally as Managers

12. Freerider has 3 classes of shares. Class A shares with voting rights but no right to a dividend, Class B shares with no voting rights but the right to a dividend and Class C shares with no voting rights and no right to a dividend but with the right on certain conditions, including a mechanism for establishing price, to be converted to Class B shares. Mr. Le Comte also produced a second shareholders agreement on the same date and drafted by the same American lawyers with the same governing law and jurisdictional provisions ("the Second Shareholders Agreement"), relating to Freerider's Class B and Class C shares and in particular to the acquisition rights attaching to Class C shares. I do not think it necessary for me to go into the rather complicated provisions of the Second Shareholders Agreement for present purposes but I will mention one particular aspect of it, which became the subject of dispute, later in this Judgment.

13. The purpose of the establishment of Freerider as part of the overall structure of the business association between Mr. Heinen and Mr. Le Comte was to obtain tax benefits. 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. In pursuance of this concept Mr. Le Comte also produced three further agreements known respectively as the Asset Purchase Agreement ("the APA"), the Technology Advisory Services Agreement ("the TASA") and the Intellectual Property License Agreement ("the IPLA"). Again I do not consider that a detailed analysis of these agreements, each of which is again expressed to be subject to and governed by the law of New York and subject to the jurisdiction of the New York courts, is necessary for the resolution of the particular issues between the parties in relation to the petition. However, I will endeavour to broadly summarise the provisions in general terms.

14. The APA is an agreement between Mr. Heinen's company, SPI (which subsequently became EEU) with whom the expertise and ability to develop and market TheWheel lies, on the one hand and Freerider on the other. It provides for the sale and transfer by SPI (EEU) to Freerider of certain intellectual property in TheWheel together with a worldwide irrevocable, exclusive free license in respect of the overseas patents relating to the intellectual property, with the right to sell, lease or otherwise dispose of and to otherwise commercially exploit such intellectual property. In consideration of this Freerider was to pay 200,000 Euros in cash to SPI, together with the costs incurred by SPI in respect of patent registrations, together with an additional amount

of 10% of such costs. The APA contains detailed provisions relating to the intellectual property in TheWheel as well as various warranties and representations and other provisions. It was signed on behalf of Freerider by Mr. Le Comte and on behalf of SPI by Mr. Heinen.

15. The TASA, dated also as of July 2003, is again a New York law document. The parties are Freerider, EWW, ENA and SPI. This agreement (as does the IPLA referred to below) refers to SPI as EEU and, together with ENA and EWW, as the "e-Traction Group". The TASA provides for the provision by the e-Traction Group to Freerider of services by way of assistance with regard to the intellectual property rights in TheWheel, (as held by Freerider pursuant to the APA). This was to include providing information regarding the testing of and documentation relating to technological adjustments or modifications of the technology and the related software. It also provided for the e-Traction Group to invoice Freerider for their provision of such services and for payment to be made by Freerider within 30 days. The TASA was executed on behalf of Freerider and EWW and ENA by Mr. Le Comte and on behalf of SPI (EEU) by Mr. Heinen.

16. The last of these 3 agreements is the IPLA. It was created because late in the day it was ascertained that the Cayman Islands are not party to the international treaty on Patent Co-operation. The agreement, which by reference to the APA and TASA, provides for the grant by Freerider back to EEU and each entity within the e-Traction Group, of a non-exclusive, revocable and non-assignable royalty-bearing

sub-licence in respect of the intellectual property in TheWheel transferred to Freerider pursuant to the APA. In consideration of this, the agreement provides for a royalty to be payable by the e-Traction Group to Freerider, based on the price of each one of licensed products sold by the e-Traction Group anywhere in the world, subject to a minimum royalty payment of 500,000 Euros per annum. The IPLA, again contained other detailed provisions, including various representations and warranties. It too was a New York law document and it was again executed by Mr. Le Comte on behalf of Freerider, EWW and ENA and by Mr. Heinen on behalf of SPI (EEU). It is Mr. Heinen's position that it was agreed with Mr. Le Comte that no royalty payments would in fact be payable by EEU to Freerider pursuant to the IPLA until EEU was in a financial position to do so, a position which it has not yet achieved. Mr. Le Comte, on the other hand, disputes that no royalty payments are due to Freerider by EEU pursuant to the IPLA and in 2007 he procured Freerider to bring legal proceedings in Zutphen in the Netherlands against EEU for payment of royalties as mentioned below.

17. Mr. Le Comte did provide substantial financing for the business of the joint venture. It is accepted at the hearing that he invested a total of approximately 1.3m Euros in the venture over approximately 2 years from 2003 to 2005. He contended that his total investment amounts to some 2.5 million Euros, although I understood that to included 2 personal loans to Mr. Heinen totaling 400,000 Euros made in late or 2002 and early 2003. Mr. Van der Sluis, in cross examination, did not accept that Mr. Le Comte's total investment was as much as 2.5 million Euros.

18. Until about 2005 Mr. Heinen and Mr. Le Comte had frequent contact by phone and by email and discussed at length all aspects of the business, technical, financial and strategic. There were no formal company meetings or minutes. Mr. Le Comte also made frequent visits to the Netherlands to discuss everything concerning the joint venture business with Mr. Heinen and they met business prospects together.

19. However, gradually during the early part of 2005 relations between Mr. Heinen and Mr. Le Comte began to become strained and the previous regular communications and the provision of information about Freerider by Mr. Le Comte reduced. 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. My clear impression, in light of the evidence, is that over time Mr. Le Comte began to lose confidence in the expertise of Mr. Heinen/EEU and in Mr. Heinen's ability to successfully carry through commercial projects with third party customers involving applications of TheWheel and related technology and he began to express that view more and more forcefully to Mr. Heinen. A few of Mr. Heinen's/EEU's projects did encounter technical difficulty and as a result the cost of commercial projects in some cases exceeded the agreed budget, although according to Mr. Heinen they were still profitable in the longer term. Mr. Heinen explained in evidence that in the course of research and development of newly invented devices like TheWheel 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. He felt that Mr. Le Comte did not understand the nature and needs of such a business or accept this. 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 other 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 concerned was finalized and he became increasingly frustrated by what he perceived as the unreliability of Mr. Heinen's projects and the cost they involved. The impression I gained was that there was also an increasing concern on his part at the length of time, it was becoming apparent, which it would take for him to make any return on his own substantial financial investment in the business.

20. During 2005 Mr. Le Comte began to make it clear to Mr. Heinen that he was unwilling to allow Freerider to continue to provide further funding to EEU unless Mr. Heinen agreed with and adopted Mr. Le. Comte's view of how the business of EEU should operate. He told Mr. Heinen that he would not allow EEU to continue as

it had. In June 2005 he endeavoured to remove Mr. Heinen's wife as financial controller of EEU on the ground that, he claimed, she was not competent and also that she was not willing (because she considered that it was inappropriate for use with Dutch VAT requirements) to adopt the QuickBooks software, which Mr. Le Comte used, for EEU's accounting purposes. This was obviously a significant personal issue for Mr. Heinen who told Mr. Le Comte that if his wife had to leave EEU he would leave himself. Mr. Le Comte also tried to prevent EEU from employing Mr. Heinen's son and it appears that relations between the two men became increasingly strained and difficult.

21. At about the same time in 2005 Mr. Le Comte told Mr. Heinen that funding would only be provided to EEU to keep the business going for a further 6 months and not thereafter unless Mr. Heinen adopted Mr. Le Comte's views. He also tried to restrict to an almost minimal level the expenditure by EEU which Mr. Heinen could approve, notwithstanding that Mr. Heinen was himself also a director of EEU. As a result of Mr. Le Comte's threat to cut off funding of EEU after 6 months Mr. Heinen was seriously concerned about the future financing of the ongoing development of TheWheel and his various other projects. He felt that he had no alternative but to seek alternative funding. He accordingly approached the Investor Group for further financing and, following a meeting in November 2005 at which Mr. le Comte was present, the Investor Group agreed to provide further substantial funding, although according to Mr. Heinen after payment of EEU's outstanding obligations to its suppliers and other indebtedness only approximately 150,000 Euros was left

available to finance the further work on development and testing of TheWheel and related technology over the first half of 2006. 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. This inevitably had a very adverse effect on the conduct of the business and was also naturally of considerable concern to the Investor Group. In January 2006 a demonstration of TheWheel technology on a bus in Bremen, Germany, known as "The Whisper" project, which Mr. Le Comte attended, was not successful due to technical problems and Mr. Le Comte's disappointment and concern increased.

22. Matters came to something of a head in August 2006. On 15th 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. This clearly left EEU in a very difficult financial position. If there was to be no more funding by Freerider or Mr. Le Comte and yet the company was to do what Mr. Le Comte was insisting on and not enter into any more commercial contracts as it had been doing, EEU would quickly go bankrupt. This was clearly a matter of very considerable concern to Mr. Heinen who understood that Mr. Le Comte was abandoning him. As a result, on 16th August 2006 Mr. Heinen emailed Mr. Le Comte and told him that, with effect from 1st August 2006, there would be a clear break and change in the strategy of the business which

would now follow Mr. Heinen's approach. In future EEU would seek to secure small scale commercial contracts relating to his/EEU's technology, with or without TheWheel. He expressed regret for the fact that he had no choice other than to take the various measures set out in his email but in effect he was taking control of EEU's business. He was, of course, a director of the company. Mr. Le Comte did not reply to this email but not long after that he was offering to sell his stake in Freerider and the e-Traction Group to the Investor Group, although it appears that during October 2006 it became clear that agreement could not be reached on an appropriate price. In the meantime relations between Mr. Heinen and Mr. Le Comte continued to deteriorate. By this time Mr. Heinen was entirely excluded by Mr. Le Comte from the management of Freerider and Mr. Heinen was provided with no copies of Freerider's accounts or other records.

23. Then in June 2007 matters took a significant turn for the worse. Mr. Le Comte, as a director of EMS, the Luxembourg company which is the general partner of EWW, without any notice to, still less consultation with, Mr. Heinen, procured EMS to bring proceedings in Luxembourg for the removal of Mr. Heinen as a director of both EMS and EWW. Although the court in Luxembourg declined to remove Mr. Heinen, this was naturally seen by Mr. Heinen (and the Investor Group) as a highly inappropriate, unjustified and aggressive action by Mr. Le Comte.

24. Then following this, in July 2007 Mr. Le Comte, again without notice to or consulting his fellow director, Mr. Heinen, procured Freerider to commence legal

proceedings against EEU in the District Court of Zutphen in the Netherlands claiming alleged outstanding royalty payments said to be due by EEU to Freerider pursuant to the IPLA. However, of more immediate and serious practical consequence for EEU was the fact that Mr. Le Comte also caused Freerider to levy pre-judgment attachments on bank accounts and other assets of EEU. This obviously caused serious disruption to EEU's business, which was already financially precarious, and a very negative impact on its customer relations. Mr. Le Comte was, at the time, himself both a director and a shareholder of EEU (both through EWW and through Freerider). These proceedings are defended by EEU.

25. Legal proceedings were then initiated on 28th September 2007 in the name of certain employees of EEU in the Enterprise Chamber of the Amsterdam Court of Appeal seeking its intervention in the management of EEU in light of the deadlock between its directors, Mr. Heinen and Mr. Le Comte. The Enterprise Chamber is a special division of the Court of Appeal with jurisdiction to hear and resolve applications from interested parties in relation to corporate management issues. As a result of this application, on 16th October 2007 the Enterprise Chamber suspended both Mr. Le Comte and Mr. Heinen as directors of EEU and appointed an interim director in their place, Mr. Van der Ven (the witness referred to above). The Enterprise Chamber also appointed an independent lawyer, Mr. Toni van Hees, to conduct an investigation into EEU's management and to report to the Enterprise Chamber with his recommendations. Mr. Van der Ven, as the court appointed director of EEU then, having ascertained that EEU was in a serious financial situation verging on

bankruptcy, over the next few weeks put to Mr. Heinen and Mr. Le Comte a number of different specific proposals in an attempt to resolve EEU's serious financial situation and the deadlock between Mr. Heinen and Mr. Le Comte. However, although the proposals, except one, were acceptable to Mr. Heinen, Mr. Le Comte either insisted on unacceptable conditions of his own or rejected the proposals outright. Mr. Le Comte also told Mr. Van der Ven that he did not need Mr. Heinen and he made allegations of fraud and misappropriation of company funds against Mr. Heinen. Mr. Van der Ven, after investigating the position, concluded that these allegations were wholly unfounded. Mr. Van der Ven gained the clear impression that Mr. Le Comte was not interested in resolving the matter but was only interested in pursuing his own personal interests and acquiring the patents for himself. Mr. Le Comte's Dutch lawyers then wrote to Mr. Van der Ven threatening him with personal liability in relation his actions and the possibility of the bankruptcy of EEU. Mr. Van der Ven considered that he had no alternative but to resign and on 14th December 2007 he so informed the Enterprise Chamber. On the same date the Enterprise Chamber confirmed the suspension of Mr. Le Comte and reinstated Mr. Heinen as a director. They also recommended that EEU appoint Mr. Van der Ven as a consultant to assist Mr. Heinen, which was duly done. The Enterprise Chamber also directed that the shares in EEU (held by EWW) should be held by a trustee to prevent Mr. Le Comte procuring EWW to exercise any shareholder rights in respect of EEU.

26. Mr. Van Hees submitted a preliminary report to the Enterprise Chamber on 4th March 2008 in which he expressed the view that Mr. Le Comte had engaged in improper conduct in relation to EEU and was responsible for mismanagement of the company. Mr. Van Hees was unable to prepare a further more extensive report due to the inability of EEU to meet the cost involved. The Enterprise Chamber issued its final decision on 8th September 2008 in which it concluded that there was a deadlock between Mr. Heinen and Mr. Le Comte and held Mr. Le Comte responsible for mismanagement. They removed Mr. Le Comte as a director permanently and ordered that the shares in EEU should be held by the trustee for at least 2 years. Mr. Le Comte has appealed against these rulings of the Enterprise Chamber to the Supreme Court of the Netherlands. However, although the appeal has not yet been heard, under the Dutch system the Procurator General of the Supreme Court is required to provide an opinion to the Court advising on the merits of any appeal. The Procurator General has now provided such an opinion dated 9th April 2010 to the Supreme Court in relation to Mr. Le Comte's appeal in which he gives the opinion that the appeal has no merit and should be dismissed.

27. Further proceedings were then commenced in the District Court of Zutphen, Netherlands by EEU seeking damages and other relief against Mr. Le Comte in respect of his mismanagement of the company. Mr. Le Comte has in turn disputed the jurisdiction of the Zutphen court to hear the case and that jurisdictional dispute has, I understand, yet to be resolved.

28. In February 2008 Mr. Heinen ascertained, through the corporate administrators of Freerider, Walkers, that the register of members did not reflect the proper allocation of shares to the Investor Group. Mr. Le Comte refused to instruct Walkers (who have since resigned because of the deadlock between Mr. Heinen and Mr. Le Comte) to amend the register. He contends that the Investor Group failed to sign the necessary Share Transfer document. The Investor Group says that the document sent to them contained inappropriate and unacceptable conditions. Despite the Investor Group having involved lawyers in New York in attempt to resolve this issue, there appears to be a stalemate over this.

29. In the course of his communication with Walkers Mr. Heinen also ascertained that Mr. Le Comte had given them his own address in New York State as Mr. Heinen's address also, with the result that no correspondence or other documentation received or produced by Walkers as Freerider's corporate administrators had been received by Mr. Heinen. Furthermore, it appeared that Mr. Le Comte was wrongfully keeping the register of members at his own address rather than at Freerider's registered office in Grand Cayman.

30. There are two other disputes between Mr. Heinen and Mr. Le Comte concerning the shareholdings in Freerider. Firstly, Mr. Heinen maintains that it was always understood that the shares to which he was beneficially entitled would be held and registered in the name of his company, AHAB. Mr. Le Comte disputes that and maintains that the shares concerned are in fact registered in Mr. Heinen's own name. Secondly, there is a dispute between Mr. Heinen and Mr. Le Comte concerning the

conversion of Class C shares beneficially owned by Mr. Heinen (which he says as explained above, should be in the name of AHAB) to Class B shares and the appropriate number and valuation of such shares, pursuant to the Second Shareholders Agreement.

31. On 31st March 2008 EEU gave notice to Freerider of termination of the 3 inter company agreements, the APA, the TASA and the IPLA. That purported termination was not accepted by Mr. Le Comte on behalf of Freerider.

32. Subsequently, in July 2008, and again without any notice to or consultation with his fellow director, Mr. Heinen, Mr. Le Comte procured Freerider to commence litigation in New York against Mr. Heinen, EEU and certain members of the Investor Group for a range of claims including breach of contract in respect of the APA, the IPLA, the TASA and the First Shareholders Agreement. Those proceedings are being defended and currently discovery is being carried out.

33. On 7th August 2003 Mr. Le Comte wrote to Mr. Heinen demanding that he resign as a director of Freerider. Mr. Le Comte contended that he was entitled pursuant to the First Shareholders Agreement to remove Mr. Heinen as a director of the company.

34. The petition by Mr. Heinen for the winding up of Freerider was presented in March 2009 (it was amended in certain respects not relevant to the determination of whether the company should be wound up, in April 2010). Lastly, as far as ongoing litigation is concerned, on 4th November 2009 EEU commenced proceedings against a Dutch law firm instructed by Freerider in relation to the purported transfer to

Freerider of title to certain of the patents relating the intellectual property in TheWheel. There are therefore, including the present proceedings, 7 sets of legal proceedings in 4 different jurisdictions in which Mr. Heinen and Mr. Le Comte are either directly or indirectly involved in litigating against each other.

**The Issues**

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 it is just and equitable 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 also 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. The Investor Group supports the petition.

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 that 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 a 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. 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 law**

37. Counsel for both parties relied on the well known and frequently cited passages from the judgment of Lord Wilberforce ***In Ebrahami v Westbourne Galleries Ltd. & Ors*** [1973] AC 360. Although it is well known I think it nonetheless worth repeating in

the circumstances of the present case. After reviewing a number of authorities, Lord Wilberforce said (page 379):

*"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words "just and equitable" and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal company, with a personality in law of it 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, as the respondents suggest, entitle one party to disregard the obligations 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 or inequitable to insist on legal rights or to exercise them in a particular way.*

*It would be impossible, and wholly undesirable to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence – this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping" members) of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the member's interest in the company – so that if the confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.*

*It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to "quasi-partnerships" or "in substance partnership" may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed its conceptions of probity, good faith and*

*mutual confidence and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words "just and equitable" sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company's structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in".*

I was also referred to some passages in the judgment of Lord Cross. At page 383:

*"People do not become partners unless they have confidence in one another and it is of the essence of the relationship that mutual confidence is maintained. If neither has any longer confidence in the other so that they cannot work together in the way originally contemplated then the relationship should be ended – unless, indeed, the party who wishes to end it has been solely responsible for the situation which has arisen.*

. . . . . .

*"The last case is the decision of Brightman J. in* ***In re Leadenhall General Hardware Stores Ltd.*** *(unreported) February 4, 1971. His decision not to make a winding up order was, I think, justifiable – though I cannot agree with the reasons which he gave for it. If the respondents were telling the truth – and the judge held that they were – the almost inevitable inference was that the petitioner had been stealing the company's money. A petitioner who relies on the "just and equitable" clause must come to court with clean hands, and if the breakdown in confidence between him and the other parties to the dispute appears to have been due to his misconduct he cannot insist on the company being wound up if they wish it to continue. But the judge dealt with the case on the footing that the respondents' loss of confidence in the petitioner might have been due to a tragic and inexplicable misunderstanding. If it was right in light of the evidence to deal with this case on that basis then I would have thought that a winding up order should have been made".*

38. In ***CVC/Opportunities Equity Partners Limited & Aor. v Demarco Almeida*** [2002] CILR 77 the Privy Council (Lord Millet at page 88) summarized the elements of a "quasi-partnership" company as follows:

*"Companies where parties possess rights, expectations and obligations which are not submerged in the company structure are commonly described as "quasi-partnership companies". Their essential feature is that the legal, corporate and employment relationships do not tell the whole story, and that behind them there is a relationship of trust and confidence similar to that obtaining between partners, which makes it unjust or inequitable for the majority to insist on its strict legal rights. The typical characteristics of such a company are that there should be (i) a business association formed or continued on the basis of a personal relationship of mutual trust and confidence; (ii) an understanding or agreement that all or some of the shareholders should participate in the management of the business and, (iii) restrictions on the transfer of shares so that a member cannot realize his stake if he is excluded from the business. These elements are typical, but the list is not exhaustive".*

39. In my view it is clear from these authorities that the business relationship between Mr. Heinen and Mr. Le Comte which was formed in 2003 and 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 (the use of that term has continued to be commonly used for convenience notwithstanding Lord Wilberforce's discouragement in ***In re Westbourne Galleries*** (ibid)). I will discuss the question whether, in this case, there was legitimately an understanding or agreement that both Mr. Heinen and Mr. Le Comte as the sole relevant shareholders should participate in the conduct of the business later in this judgment. However Mr. Heinen and Mr. Le Comte clearly agreed restrictions on the transfers of their shares. I did not understand it to be seriously contended on behalf of Mr. Le Comte that Freerider is not a quasi-partnership company in the sense explained in the authorities.

40. However, as summarized above, counsel for Mr. Le Comte argued strongly that the superimposition of equitable principles on legal rights is only justified where the

petitioning shareholder has a "legitimate expectation" which is not being met. I was referred in this regard to ***RBC v Thai Asia Fund Limited*** [1996] CILR 9. In his judgment Smellie J. (as he then was) said:

*"The basic principle is that a petition to wind up on the "just and equitable" ground will not succeed if what is complained of is merely valid exercise of the powers conferred by the articles. Otherwise, members would seek to exact entitlements not vested by the contractual obligation entered into with the company and with the other members and as defined by the articles. There may however be circumstances where the subject of the complaint is a valid exercise of the powers conferred by the articles but which, nonetheless, is entirely outside of what was contemplated by the members when they subscribed. In such cases, the fact that the exercise of power is within the articles will not necessarily be an answer to a petition for winding up.*

. . . . . .

*Thus, while the categories are not closed, there must be some circumstance from which that "something more" may fairly be said to derive before it may be just and equitable to wind up, when the exercise of power complained of falls legally within the articles. Here there are no circumstances giving rise to a legitimate expectation that any member will be entitled to insist on the company repurchasing its shares.*

. . . . . .

*I conclude, as a matter of law also, that there is no basis for a legitimate expectation as to justify the superimposition of equitable principles upon the contractual relationship defined by the articles and the Law. That relationship clearly allowed the Board (when they had the power) and the company, the discretion whether or not to exercise the power to repurchase: see also* ***In re Saul D. Harrison & Sons Plc (7)*** *([1994] BCC at 490).*

. . . . . .

*The circumstances of the case fall squarely within the principles settled in* ***Ebrahimi's*** *case* [**In re Westbourne Galleries**] *(ibid) which itself recognizes that the categories of circumstances giving rise to a legitimate explanation on which it may be just and equitable to wind up are not closed, even though the decision or action in question fall properly within the powers given by the articles.*

. . . . . reputation

*It is the absence, in this case, of that "something more" justifying the superimposition of equitable considerations on the exercise of such legal rights, which makes it inevitable that the petition must fail".*

It is Mr. Le Comte's position that the matters of which Mr. Heinen complains are matters governed by the First Shareholders Agreement and that he can have no "legitimate expectation" that Mr. Le Comte would not act on behalf of Freerider any differently than in accordance with his entitlement or right under Section 1 (2) of the First Shareholders Agreement. Mr. Le Comte submits that the First Shareholders Agreement clearly defines the agreed powers and responsibilities of both Mr. Heinen and himself and reflects and makes it clear what their respective expectations with regard to the management of Freerider were and are. Leading counsel for Mr. Heinen of course strongly resisted this argument and I shall address it in more detail below.

41. Counsel for Mr. Le Comte also argued that the petition should be struck out under the Court's inherent jurisdiction because it is bound to fail, not only because Mr. Heinen is unable to make good his allegations but also because he has an alternative remedy in respect of his complaints about the shareholdings in Freerider which it is unreasonable for him to choose not to pursue and accordingly it would not be just and equitable for Freerider to be wound up. In this context I was referred to the judgment of the Court of Appeal In ***Camulos Partners Offshore Limited v Kathrein & Co.*** (unreported) CICA 11/2009 - 18th March 2010 in which Chadwick P said *inter alia* as follows:

*"In the light of the judgment In **Charles Forte Investments Ltd. v Amanda** and the observations of the Privy Council in **CVC Opportunities Equity Partners v***

***Demarco*** [ibid] *there can be no doubt that it is relevant, in considering whether to restrain presentation of, or to strike out, a contributory's petition to wind up on the just and equitable ground, to address the questions*

*(i) whether there is an alternative remedy available to the petitioner and*

*(ii) whether the petitioner is acting unreasonably in not pursuing that alternative remedy.*

*If a court is satisfied that both of these questions should be answered in the affirmative, then it can be expected to take the view that the presentation of the petition is an abuse of its process; alternatively, that the petition is bound to fail because it would not, in those circumstances, be just and equitable that the company should be wound up.*

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 can 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.

42. Mr. Heinen contends that, even if the Court is not satisfied that Freerider may be wound up on the just and equitable ground on the basis that it is a quasi-partnership which has irretrievably broken down, there are two other substantial grounds which justify such a winding up. Firstly, it is said that the Court may wind up a company if

the members of the company have justifiably lost confidence in its management as a result of "a lack of probity in the conduct of the company's affairs". I was referred for this proposition to ***Loch v John Blackwood Limited*** [1924] AC 783 in which the Privy Council (Lord Shaw of Dunfermline) said at page 788:

> *"It is undoubtedly true that at the foundation of applications for winding up, on the "just and equitable" rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs but this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs but in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up".*

It is Mr. Heinen's case that he, and indeed the Investor Group, have indeed, with justification, entirely lost confidence in Mr. Le Comte as a result of what they (and others) reasonably consider to be a serious lack of probity in his conduct of Freerider's management. This is of course disputed by Mr. Le Comte and I shall express my views on that later.

43. The second alternative ground which Mr. Heinen relies is that the "substratum" of Freerider has been lost. He contends that the underlying purpose for which Freerider was incorporated is incapable of being achieved (see for example re ***German Date Coffee Company*** (1882) LR 20 Ch D169). I was referred also to In re ***Belmont Asset Based Lending Ltd.*** (unreported) FSD 15/2009 – 21 January 2010 in which Jones J. questioned the utility nowadays of the expression "loss of substratum" and whether

it is sensible to continue to adopt terminology invented in the context of England's 19th century economy. He said, by reference to three 19th century cases:

> *"To translate these statements into a modern context, it can be said that it is just and equitable to make a winding up order in respect of an open ended corporate mutual fund if the circumstances are such that it has become impractical, if not actually impossible, to carry on its investment business in accordance with the reasonable expectations of its participating shareholders, based upon representations contained in its offering document. If such a company, organized as a open ended mutual fund has ceased to be viable for whatever reason, the court will draw the inference that it is just and equitable for a winding up order to be made".*

Counsel for Mr. Le Comte argued strongly that the case was clearly distinguishable on its facts and that the judge's comments and analysis were made in relation to a company carrying on business as an open ended mutual fund and should be confined to such companies. It is undoubtedly true that the judge was considering the circumstances in which it was just and equitable to wind up a company carrying on business as an open ended mutual fund but I am not convinced that the judge's comments should necessarily extend only to companies carrying on a particular kind of business.

**Analysis and comment**

44. I have already expressed my view that the business relationship between Mr. Heinen and Mr. Le Comte amounted to a quasi-partnership. Indeed it seems to me to be almost a classic case. 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 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 relation to the company, in determining the question whether it is just and equitable to wind it up, 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 business and structure. It is quite clear, and not disputed, that the relationship between Mr. Heinen and Mr. Le Comte when the quasi-partnership began was one of mutual trust and confidence. It is also apparent that they brought different, albeit complementary, skills and experience to the venture. It was clear to me from the evidence that Mr. Heinen was and is passionate about TheWheel and that his main focus was on the technological challenges of its development and on the environmental benefit which it would bring, as well as safeguarding his creation. Mr. Le Comte on the other hand, in my assessment of him, is a businessman whose interest was commercial and financial and, while initially he was interested in helping his friend financially in light of their friendship, his motivation gradually changed to making as good a return as possible from his investment in the business relatively soon and pursuing his own financial and commercial interests.

45. It also seems almost incontrovertible to me that the relationship between Mr. Heinen and Mr. Le Comte has irretrievably broken down both at a business level and at a

personal level. The mutual confidence and trust between them ceased some time ago and is now non-existent. 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 shareholdings 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. Mr. Le Comte suggested in his evidence that the breakdown is not necessarily irretrievable. It may be that he 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. In my judgment, the breakdown in the relationship should be treated for these purposes as irretrievable.

46. As I have already said 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 had and 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. In these circumstances, and in reliance particularly upon the judgment in ***RBC & Others v Thai Asia Fund Limited*** (ibid), which I have referred to above, Mr. Le Comte argues that there is and can be no legitimate expectation on the part of Mr. Heinen that the rights and responsibilities of each of them in relation to management is other than as set out in the First Shareholders Agreement. Accordingly, it is said, there is no basis in this case for the superimposition of equitable principles upon the contractual relationship between the parties in the First Shareholders Agreement.

47. While Mr. Le Comte's argument in this regard had an initial attraction, I have concluded that it is not right for several reasons. Firstly, factually there is, as far as I am concerned, 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, including Freerider as part of the overall business structure. My assessment of the evidence is quite to the contrary. Although, as I have said, at least in the first year or so Mr. Heinen's principle 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 by 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. Comte and he anticipated and expected that it would operate as a partnership, as it in fact did for the first year or so. I have already made reference to the fact that the First Shareholders Agreement (as also the other agreements produced by Mr. Le Comte) was drafted by New York lawyers instructed by Mr. Le Comte. Whether or not they were, as Mr. Le Comte contended, Freerider's lawyers – although Freerider

did not exist until July 2003 – the reality is that it was Mr. Le Comte who dealt with and gave instructions to them and there is no evidence that Mr. Heinen had any significant direct input into the relatively complicated (to a layman) wording of the specific provisions. Apart from the fact that Mr. Le Comte happens to live in New York State, there is no obvious reason why the First Shareholders Agreement and the other agreements should have been drafted so as to be governed, as they are, by New York law and subject to the jurisdiction of the New York courts. None of the parties, other than Mr. Le Comte, nor the business of the venture in respect of which the structure was created had any connection with New York. Freerider is a Cayman Islands company, EEU, which is the company which actually produces, develops and works on TheWheel and which has the business premises and employees, is a Dutch company operating in and from the Netherlands. Its sole shareholder, EWW, is a Luxembourg limited partnership of which the general partner, EMS, is a Luxembourg company. Mr. Heinen is obviously resident in the Netherlands and his company, AHAB, is also a Dutch company. Mr. Heinen said he did not take any legal advice himself in relation to any of the agreements and he understandably said in evidence that if he had known then what he knows now, he would never have agreed to the First Shareholders Agreement (and the other agreements) being New York law documents and subject to the jurisdiction of the New York courts. 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 the Chief Technology Officer and whatever the legalistic wording of the First Shareholders Agreement may have said.

48. I should also add that it is anyway by no means clear to me that the difference of opinion between Mr. Heinen and Mr. Le Comte relating to the way in which the business should be carried on, which difference they both agreed is accurately summarized in the report of Mr. Van Hees to the Enterprise Chamber, actually does anyway fall entirely within Mr. Le Comte's sole discretion pursuant to the provisions of the First Shareholders Agreement, as he contends. 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 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. Even if, contrary to my view of the evidence, Mr. Le Comte is right about what he says was the sole cause of the breakdown in

relations between them, it was not, in my opinion on the facts, 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.

49. The relevant authorities make it quite clear that the words "just and equitable" in the statute are general and are not to be limited or restricted to certain categories or classes of case or more narrowly defined. That was made very clear by Lord Wilberforce in ***In re Westbourne Galleries Ltd.*** (ibid) at page 377 when he said:

> *"There has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances".*

Furthermore, his classic statement (which I repeat for emphasis)

> *"It* [equity] *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, or inequitable, to insist on legal rights, or to exercise them in a particular way".*

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. It does not seem to me that the judgment in ***RBC & Others v Thai Asia Fund Limited*** (ibid), on which counsel for Mr. Le Comte, placed considerable emphasis, deflects in any way from this, quite apart

from the point that the circumstances of that case were entirely different from those in the present case. At page 24 Smellie J. (as he then was) said:

> *"The basic principle is that a petition to wind up on the "just and equitable" ground will not succeed if what is complained of is merely a valid exercise of the powers conferred by the articles"* [my emphasis].

The Learned Judge went on to determine, having made it clear that the categories are not closed, that in the particular circumstances of that case there were no circumstances justifying the superimposition of equitable principles upon the contractual relationship defined by the company's articles of association. He was satisfied that in that case what the petitioners were complaining of was "merely" a valid exercise of the powers conferred by the articles and that there were no circumstances from which the "something more" required for the superimposition of equitable considerations could be fairly said to have arise. This does not, in my view, detract in any way from the classic statements of Lord Wilberforce in ***In re Westbourne Galleries*** (ibid). The circumstances in which it may be just and equitable to wind up a Company are many and varied and are not limited or restricted. Each case will obviously depend entirely upon its own circumstances. 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.

50. Mr. Le Comte also seeks to argue that Mr. Heinen does not come to Court with "clean hands" and that it is he who is responsible for the breakdown in relations.

Therefore, it is submitted, Mr. Heinen is not entitled to the equitable relief which he seeks and the petition should be struck out under the Court's inherent jurisdiction since it has no reasonable prospects of success. This argument, of course, depends upon a detailed analysis of the history of the business relationship between Mr. Heinen and Mr. Le Comte which I have endeavoured to summarise above. In broad summary Mr. Le Comte, in addition to his argument that Mr. Heinen was bound to accept his views on what he considered was the appropriate business strategy, also contends that the reality is that because Mr. Heinen no longer wanted to be bound to the agreements with Mr. Le Comte but wanted to run the business in his own way, Mr. Heinen effectively "hijacked" EEU in August 2006 for his own purposes. He argues that Mr. Heinen, having had the benefit of substantial financial investment by Mr. Le Comte, wanted to revert to the way things were before July 2003 and that his actions since at least August 2006 have been consistent with that objective. He says Mr. Heinen has wholly disregarded, indeed acted contrary to, the interests of Freerider and in breach of his fiduciary obligations as a director of the company. He also alleges that Mr. Heinen has largely been put up to this by members of the Investor Group who wish to control the business without any involvement of Mr. Le Comte. He further alleges that Mr. Heinen has misappropriated funds provided to EEU by Freerider for his own personal use. On the other hand, Mr. Le Comte contended that he had at all times acted in the best interests of Freerider and within his own rights under the First Shareholders Agreement and in accordance with Freerider's rights under the other three agreements.

51. At this point I should say something about my impression of the witnesses and in particular Mr. Heinen and Mr. Le Comte. Having observed their respective demeanour and manner, the way in which they answered questions and my assessment of their reliability, I have to say that I much preferred the evidence of Mr. Heinen to that of Mr. Le Comte. 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 seemed 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. My impression 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 give the main focus of his interest, which I have outlined. 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.

52. On the other hand, I did not find Mr. Le Comte a very satisfactory or objective witness and I was left with a considerable degree of cynicism about the real motives behind his 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. I found his evidence, in some respects, to be evasive and inconsistent with or contrary to the written record. On occasion he endeavoured to introduce new evidence in endeavouring to justify his actions or statements. 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 or unable to accept that he has done anything wrong or inappropriate, that there may be another point of view or that he is in any way to blame for what has happened. As far as he is concerned he has legal right on his side.

53. Mr. Heinen said that he sent the email of 16 August 2006 because he felt abandoned by Mr. Le Comte and that he had no alternative, in order to protect TheWheel and to prevent EEU from going bankrupt but to take over full control of EEU and pursue a business strategy for the company which would enable it to have an income in order to be able to continue his work on TheWheel and related technology. I do not accept the contention that he "hijacked" EEU or that his intentions were as Mr. Le Comte contends. Mr. Heinen was clearly and justifiably concerned about the financial

position of EEU as a result of and in light of the adverse implications for TheWheel of Mr. Le Comte's insistence on his view of how the business should operate and his withdrawal of financial support, whether by Freerider or himself. TheWheel, its associated technology and their development and subsequent exploitation were the very raison d'être of the whole business and, in my judgment, having regard to the understanding, particularly of Mr. Heinen, as to the purpose of the business, his action in August 2006 was justified and not unreasonable and was not the cause of the eventual breakdown of the quasi-partnership between him and Mr. Le Comte but rather a symptom of it. Mr. Le Comte's reaction, or rather lack of reaction, to Mr. Heinen's email of 16th August 2006 is not at all consistent with his present contention that it amounted to a hijacking of EEU by Mr. Heinen. I have already remarked upon what seems to me to be the real cause of the breakdown, namely Mr. Le Comte's increasing loss of faith in Mr. Heinen's technological abilities and in TheWheel itself. His reaction to the problems with the Whisper project in Bremen in January 2006, after he had already given Mr. Heinen 6 months notice in June 2005 that there would be no further funding of EEU, clearly confirmed his lot of confidence in TheWheel project. By March 2006 Mr. Le Comte was communicating with Mr. Heinen about leaving the business and selling his stake and then on 15th August 2006 Mr. Le Comte told Mr. Heinen on the telephone, as Mr. Heinen understands it, that Mr. Le Comte was effectively abandoning management of the companies in Europe of which he was CEO. The clear overall impression I gained was that the real cause of the breakdown was Mr. Le Comte's lack of understanding and acceptance of the way in which Mr. Heinen/EEU had operated and required to

operate in order to properly test, develop and refine TheWheel and its associated technology in different ways and in different circumstances for different purposes and in the process to gain an income stream in order to enable them to continue with such development, testing and refinement. It was Mr. Le Comte who lost confidence in Mr. Heinen and his projects and who 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. My impression is that Mr. Le Comte's interest had in reality become solely focused on his own financial investment in the business and his own personal interests. Mr. Van der Ven and others clearly felt that Mr. Le Comte's real objective was eventual procurement of the intellectual property rights in respect of TheWheel technology for himself.

54. Mr. Le Comte was very critical of the Investor Group, and particularly the Van der Sluis family. In my view, the Investor Group were and are perfectly entitled to seek to protect their significant investment in the business in light of what they inevitably perceived to be the serious problems due to the deadlock between Mr. Heinen and Mr. Le Comte. The Van der Sluis family are all experienced and successful business people and they attributed the principal blame for the problems to Mr. Le Comte. Mr. Le Comte also criticized and challenged the proceedings before the Enterprise Chamber. He alleged that Mr. Heinen and members of the Investor Group, particularly Mr. Van der Sluis, were the real instigators of the proceedings. Mr. Heinen and Mr. Van der Sluis both freely acknowledged in their evidence that they had sought advice concerning the problems relating to EEU from a lawyer in

Amsterdam who had suggested an application to the Enterprise Chamber. However, Mr. Van der Sluis held no position at EEU and was in no position to compel the employees there to bring legal proceedings. Mr. Heinen denied that he had procured the relevant employees to bring the proceedings and had, in his capacity as a director, simply authorised them to do so if they wished. In fact the first step taken by the Enterprise Chamber was to suspend both directors of EEU, including Mr. Heinen himself. Mr. Le Comte also sought to discredit Mr. Van der Ven on various grounds, none of which I found convincing. 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 of EEU 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. It was Mr. Le Comte who, of course, subsequently threatened to sue Mr. Van der Ven. I was not impressed by the criticisms of Mr. Van der Ven or the attempts to challenge his integrity. 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 the decision to permanently remove Mr. Le

Comte as a director of EEU. Mr. Le Comte's criticism of everyone involved in the Enterprise Chamber proceedings and their decision extended, as I have mentioned, even to the President of the Chamber. Although Mr. Le Comte has appealed to the Supreme Court of the Netherlands in respect of the proceedings in the Enterprise Chamber, that appeal has not yet been heard. I must, of course proceed on the basis of circumstances as they are at this time; however, I have already noted that the Procurator General of the Supreme Court has advised the Court that Mr. Le Comte's appeal should be dismissed.

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.

56. As far as the evidence of Mr. Van der Sluis, a member of the Investor Group is concerned, his evidence mainly related to the Investor Group's investment in the business which by February 2006 had reached approximately 1.6m Euros. He explained their considerable concerns about the deadlock between Mr. Heinen and Mr. Le Comte which resulted initially in their attempt to reach agreement with Mr. Le Comte about a buyout of his stake in the business, which was unsuccessful. He also explained his consultation, along with Mr. Heinen, of the lawyer in Amsterdam to which I have referred. Mr. Van der Sluis confirmed the Investor Group's considerable anxiety about the position and particularly their serious concern 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 creditability of Mr. Van der Sluis' evidence, which was not, in my view, challenged in any material way.

**Loss of substratum**

57. I am satisfied that the evidence establishes that the whole purpose and rationale for the incorporation of Freerider was, as I have already mentioned, 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 such payments if they were made in the Netherlands. There was evidence also that Mr. Heinen wanted the intellectual property rights in respect of his inventions to be held outside EEU in case of EEU's insolvency or bankruptcy. However, it did not require a company or entity in the Cayman Islands in order to achieve that.

58. It is also clear from the evidence that the tax benefit objective of incorporating Freerider cannot 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. Mr. Le Comte alleged that Mr. Heinen deliberately procured this ruling by the Dutch revenue authorities in order to further his overall objective. Mr. Heinen was cross-examined in some detail about this but I am satisfied that this allegation was not established, indeed the opposite is true. The evidence of Mr. Heinen, which I accept, is that he used his best endeavours to dissuade the Dutch tax authorities from taking the position which they have and has done all he reasonably could to uphold the tax benefit purpose behind the incorporation of Freerider.

59. I have already mentioned the authorities to which I was referred in relation to this ground of the petition. 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. It was submitted that Freerider is perfectly viable with

legitimate future 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 these tests are met in the present case. In my view the sole function of Freerider was to receive and hold royal payments for tax reasons, which reasons are not valid. The company will not achieve its purpose, which is incapable of achievement in 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.

**Conclusions**

60. As I have already said, 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 has 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. 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. 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 for winding up the company on the just and equitable ground. It follows from these conclusions that Mr. Le Comte's application for the petition to be struck out is refused. Mr. Le Comte's application to stay the petition pending the outcome of the proceedings in New York was not pursued.

**Alternative remedies**

61. Section 92 (3) of the Law provides as follows:

> *"(3) If the* [winding up 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 a winding-up order –*
>
> *(a) an order regulating the conduct of the company's affairs in the future;*
> *(b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;*
> *(c) an order authorizing civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or*
> *(d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of the purchase by the company itself, a reduction of the company's capital accordingly".*

It is now well established that this does not enable a free-standing application, of the kind available in the United Kingdom, for any of the remedies provided for in this subsection of the Law. The remedies are only possible alternatives to a winding up order once the Court has decided that a winding up on the just and equitable ground

should otherwise be made see: ***Strategic Turnaround Master Partnership Limited*** (unreported) 12 December 2008 per Vos JA and ***Camulos Partners Offshore Limited v Kathrein & Co.*** (unreported) 18 March 2010 per Chadwick P.

62. In his amended winding up petition Mr. Heinen pleaded that he had proposed to Mr. Le Comte that an independent director should be appointed to Freerider's Board of directors in order to resolve the deadlock between him and Mr. Le Comte. He pleaded that Mr. Le Comte had refused to do that. However, recently Mr. Le Comte has himself sought to appoint a third director of Freerider, namely Mr. Peter Anderson of Rawlinson Hunter, Grand Cayman. Mr. Le Comte purported to convene a shareholders meeting for this purpose on 9th April 2010 but, as Mr. Heinen did not attend, the meeting was inquorate and was adjourned until 16th April 2010 when Mr. Le Comte, as one of the two voting shareholders, purported to appoint Mr. Anderson as a third director. It was submitted on behalf of Mr. Heinen that this appointment is invalid as not being in compliance with the company's articles of association. Mr. Heinen's position is that he is seeking the winding up of Freerider for the reasons already discussed but that if the Court, as an alternative to a winding up order, considers that a third director should be appointed, such a director should be appointed by the Court and not Mr. Le Comte who contends he would be able to remove him or appoint other directors pursuant to his alleged rights under the First Shareholders Agreement. Mr. Heinen also pointed out that he had never met and knew nothing about Mr. Anderson. Mr. Le Comte's own evidence was that he had only met Mr. Anderson for the first time when he had come to Grand Cayman to

attend the hearing and that Mr. Anderson had been suggested to him by his Cayman Islands attorneys. 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.

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 <u>any</u> 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 a 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 ***<u>In re Copeland v Craddock Ltd.</u>*** [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 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.

65. In the circumstances of this case, in my judgment, neither of the alternative remedies proposed by Mr. Le Comte is appropriate. I therefore decline to make the orders, alternative to a winding up of Freerider, which he seeks. I am therefore of the opinion that it is just and equitable that Freerider should be wound up and I so ordered.

66. Mr. Heinen, as petitioner nominated Mr. Roy Bailey of Ernst & Young, Grand Cayman and Ms. Margaret Mills of Ernst & Young, London to be the Joint Official Liquidators of Freerider. They are both qualified insolvency practitioners and partners in their respective firms. They each have significant relevant experience and the necessary professional indemnity insurance. In my view it is appropriate that one of the Official Liquidators should be based in Europe in light of the obvious connection with the Netherlands and Luxembourg. I therefore ordered that Mr. Bailey and Ms. Mills be appointed Joint Official Liquidators of Freerider. I have reserved costs, on which I will hear submissions at a later date.

Dated: 13th May 2010

Hon. Mr. Justice Angus Foster
Judge of the Grand Court

GRAND COURT CAYMAN ISLANDS