Neutral Citation Number: [2019] EWHC 3183 (Ch)

Case No: BL-2019-MAN-000051

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS IN MANCHESTER
INSOLVENCY AND COMPANIES LIST (Ch D)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date: 22 November 2019

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

(1) ROBERT GLEW & DENTON AND CO TRUSTEES LIMITED **(2) NICHOLAS HENDERSON & DENTON AND CO TRUSTEES LIMITED**	**Claimants**
- and -	
(1) DR ARPI MATOSSIAN-ROGERS **(2) YVONNE PAMBAKIAN** **(3) AMRO BIOTECH PLC**	**Defendants**

- -
- -

Mark Harper QC (instructed by **Harrison Drury Solicitors, Preston**) for the **Claimants**

Paul Strelitz (instructed by **Venner Shipley Solicitors, London EC1A**) for the **First and Second Defendants**

Hearing dates: 28 – 29 October 2019
Draft judgment circulated: 6 November 2019

- -

APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

……..

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

Introduction and summary of decision

1. The claimants seek permission under s.261 Companies Act 2006 ["**CA 2006**"] to continue the claim issued on 28 May 2019 as a derivative claim. In summary, the claimants, being two of the minority shareholders in the third defendant company, Amro Biotech plc ["**the Company**"], seek permission for the Company to bring a claim against the first defendant ["**Dr Rogers**"] and the second defendant ["**Ms Pambakian**"] alleging breach by them of their duties as directors towards the Company. The first and second defendants are, directly and indirectly through family shareholdings, the owners of 81.4% of the shares in the Company. The Company has, of course, taken no active part in the application for permission. Thus, although the Company is a nominal defendant to the claim form, for convenience I shall refer to Dr Rogers and Ms Pambakian as the defendants.

2. Both the claimants and the defendants have filed voluminous evidence and I have read and heard detailed and impressive submissions from their respective counsel Mr Harper QC and Mr Strelitz over the course of a two-day hearing. Having considered the evidence and the submissions I have come to the conclusion that permission should not be granted. After circulation of my judgment in draft Mr Harper invited me to consider amplifying or clarifying certain parts of the judgment and I confirm that to the extent I consider it necessary or otherwise appropriate I have done so. Some of his invitations appeared to me clearly to fall on the wrong side of the line between legitimate requests for amplification or clarification and attempts to re-argue the case.

3. I set out my reasons below under the following sub-headings:

A. Relevant facts

4. I cannot on an application such as this resolve disputed factual issues where all of the relevant evidence may not be before me and where oral evidence may be required. Nonetheless, in order to determine this application fairly and in accordance with the relevant principles it has been necessary for me to consider the documentary evidence produced in some detail and with some care in order that I can make a proper assessment of the strength of the proposed claims before deciding whether or not permission should be given for the claim to be continued as a derivative claim.

5. Dr Rogers is an academic scientist who has had a career as a lecturer and researcher at the Royal London Hospital. She has also had a lifelong interest in and had undertaken discovery research into the causes and treatment of diabetes. In the course of that research she identified certain monoclonal antibodies as having the potential to be used in the treatment of diabetes and in the prediction of the onset of diabetes. In 1997 she filed for and duly obtained a patent in the UK (and later internationally) in relation to discoveries she had made in that area ["**the 1997 patent**"]. By 1999 she had resigned as lecturer, her intention being to work with her late husband and her daughter, Ms Pambakian, to proceed from discovery research into development research with a view to producing a medicine using monocolonal antibodies to treat diabetes.

6. It was clear that finance would be required in order to fund research and development ["**R&D**"], including clinical trials and obtaining regulatory approval, before products could be developed, approved and placed on the market. The Company was incorporated for this purpose in May 1999 as a result of advice from a Mr Watkins (an accountant, who became finance director of the Company and who remains a shareholder and now supports this claim) and to Mr Walker (another accountant, then with a firm known as Mazars, who became commercial director of the Company and who also remains a shareholder and supports this claim). The strategy was for the Company to secure investment funding and then undertake the necessary R&D and obtain the necessary approvals leading to production and marketing. For these purposes it was decided that the Company would be granted a licence by Dr Rogers to use the 1997 patent. It was agreed that the Rogers family would obtain at least 75% of the controlling shareholding in the Company. Whilst the witness statements of Dr Rogers on the one hand and Mr Watkins and Mr Walker on the other reveal disputes as to what was agreed between them at the time of incorporation of the Company, I am not in any position to draw any clear conclusions one way or another and nor are such matters decisive of the current application.

7. What is common ground is that in July 1999 two relevant agreements, drafted by reputable solicitors, were entered into between Dr Rogers and the Company. The first was a Patent Licence Agreement ["**the 1999 PLA**"] and the second was a Service Agreement ["**the SA**"]. The provisions of these agreements in relation to the ownership of what was defined as "Improvements" to the defined "Patent Rights" (defined as being the 1997 patent) and "Know-How" (defined as being the know-how relating to the 1997 patent) are of critical importance to this case.

8. In summary, under the 1999 PLA Dr Rogers granted the Company the right to use the patent rights and the know-how for a minimum term of 15 years, rolling on from year to year unless subsequently terminated on notice[1], for the purposes of carrying out R&D to obtain authorisation to market and sell the "Products" (defined as "diagnostic, predictive and medicinal products for diabetes and any other applications discovered during the carrying out

[1] The Company had the right to terminate within the 15 year term on 6 months' notice, but Dr Rogers had no such right.

of R&D or otherwise during the term of the licence") in return for the payment of 4% royalty on the "Net Sales Value" (as defined) of such products.

9. Of considerable significance to this case are the provisions made for improvements, widely defined as being "all improvements, modifications or adaptions to any part of the inventions the subject of the patent rights and the know-how which might reasonably be of commercial interest to either party in the development, manufacture or supply of the products which may be made or acquired by either Dr Rogers or the Company during the term of the agreement". For convenience and save where necessary to distinguish I shall refer to this compendiously as improvements to the Intellectual Property ["**IP**"]. Under clause 10, as material and in summary: (a) there was a mutual obligation to disclose improvements to each other; (b) the Company was entitled to use and exploit improvements disclosed by Dr Rogers during the course of the agreement; (c) improvements arising from work carried out by Dr Rogers alone should remain her exclusive property, whereas improvements arising from work carried out by the Company alone should remain its exclusive property and each party should have the exclusive right to apply for patent protection in that respect; (d) the Company's improvements included those arising from work carried out by Dr Rogers for the Company under the 1999 PLA; (e) improvements arising from work carried out jointly should belong to the parties equally and they should each have the right to use such information independently of each other.

10. Although there was no definition of what was meant by "work carried out", there was a consultancy provision in clause 12 of the 1999 PLA under which Dr Rogers agreed to provide consultancy services in return for remuneration as payable under the SA, which included assisting in the ongoing operation and development of the know-how. She also agreed to assign to the Company all rights she might have in respect of the product of the consultancy services, including the right to apply for patent or other IP rights protection.

11. Under the SA the Company appointed Dr Rogers as chairman and joint CEO at an annual salary of £50,000 plus a bonus provision on the basis of her devoting substantially her whole time, attention and ability to her duties. Under clause 11, entitled "inventions", it was provided, as material and in summary, that in relation to IP: (1) it was foreseen that Dr Rogers might generate IP in the course of her duties; (2) it was agreed that she had a duty to further the Company's interests in that respect; (3) she was required to disclose any such IP "relating to or capable of being used in the" Company's business to the Company on the basis that it was to be its absolute property to exploit. It was also provided that if "during the appointment" she should generate IP which was not to be the Company's property then the Company nonetheless had the right to acquire the IP within 6 months of her disclosing the same, on terms to be agreed or in default settled by arbitration.

12. It was provided that the SA would continue subject to termination on 12 months' notice but last for at least 3 years, save that it would terminate automatically on Dr Rogers' 70th birthday in June 2013.

13. At around the same time as the 1999 PLA and SA were entered into the Company issued a prospectus seeking investment of up to £1.5 million. It was explained that in order to develop the product it would be necessary to obtain funding to proceed to phase 1 and then to phase 2 clinical trials. It was stated that Dr Rogers would be mainly responsible for R&D and overseeing patent related matters, including the design and management of the clinical trials which were to be carried out by separate subcontracted companies. Reference was made to the potential availability of Enterprise Investment Scheme ["**EIS**"] tax relief for investors. It was envisaged that if the phase 1 and 2 clinical trials went well it would still be necessary to proceed to phase 3 trials before a product licence application could be made. The Appendix made reference to, and summarised, some of the provisions of the 1999 PLA and the SA.

14. It appears that some £300,000 was raised, which was enough to fund clinical trials, and that in 2005 further substantial investment was sought from a Swiss-based investment company, which was duly provided and channelled through a Dutch registered company known as Amro Biotech (Netherlands) BV ["**Amro BV**"]. It was proposed that Amro BV be granted a sub-licence to exploit the IP. In connection with this proposal a side letter amending the 1999 PLA was entered into, the drafting of which is said by the claimants to have materially impacted on the amount of the royalties payable under the 1999 PLA. In 2006 a report into the valuation of the product under development was commissioned by Amro BV, which recorded that the phase 1 and 2 clinical trials had been undertaken (by a company associated with the Company, known as NDR Ltd) and that the development was close to starting phase 3 trials in the Netherlands. It suggested that the product, if successfully approved, had a value of $9.5 billion. This valuation was heavily caveated and has subsequently been criticised by the claimants; nonetheless it does indicate that at the time the perception was that if the product could be developed and successfully brought to market it would have a very substantial value.

15. At around the same time, a further application for a further patent was made in the UK (in August 2005) and subsequently internationally and duly granted ["**the 2005 patent**"]. It described Dr Rogers as the inventor. The subject matter of the 2005 patent was stated to be certain peptides derived from certain antibodies, and it was further stated that this was a concept originally described in the 1997 patent. Reference was made to diabetes and to other diseases which might be suitable for treatment using this invention. In her first witness statement Dr Rogers asserts that the 2005 patent resulted from work carried out in her own time and alone apart from her work for the Company. She explains the nature of the invention at paragraph 38 of her first witness statement and in paragraph 39 states her understanding that the 1999 PLA and the SA covered only the drug development work to get through the regulatory pathways to bring the product to market, which is different from the "innovative intellectual work that led to improvements which I did as licensor, alone in my own time". She does not, however, provide details as to the circumstances in which this "innovative intellectual work" was done and how it differed from the work which she did in her capacity as paid consultant to the Company working under the SA. Ms Pambakian's evidence is even less detailed, simply referring to Dr Rogers having worked at nights and at weekends throughout her working life when engaged in research and writing.

16. In his second witness statement, produced in response to the evidence lodged by the defendants, Mr Glew asserts at paragraph 22 that the 2005 patent adopted the clinical trials which were undertaken and paid for by the Company and at paragraph 23 that a subsequent 2014 patent, also applied for and obtained in Dr Rogers' name, relied on evidence obtained from clinical trials also paid for by the Company. However that evidence is not, of course, evidence from someone with expert knowledge in the area in question and, it might be said, involves an assumption that an invention which arises out of material obtained from a clinical trial paid for by an entity must therefore also belong to that entity, regardless of the degree of connection between the material and the ultimate invention.

17. In her letter to shareholders of May 2008 Dr Rogers, writing in her capacity as chairman of the Company, referred to the ongoing clinical programme and its expansion to cover other conditions such as cancer. She referred to the agenda to move the company forward as including "new product development, new indications [i.e. conditions], new IP submissions". She did not expressly refer to the 2005 patent as having been applied for and obtained in her name, but neither did she suggest that it belonged to the Company. The annual report and accounts for the year ended 30 June 2008 did not specifically address these issues either. Mr Walker does not in his witness statement explain whether or not he was aware that the 2005 patent had been filed for in Dr Rogers's name or, if he was, whether he considered that this represented a breach of the 1999 PLA or was otherwise concerned about this development.

18. Although it appears that substantial further R&D was undertaken with the benefit of the monies invested through Amro BV unfortunately the project was subsequently delayed for a number of years for a number of reasons, one of which was the adverse publicity resulting from the tragic death of Dr Rogers' other daughter, resulting from the administration of an experimental drug by Ms Pambakian, and the subsequent investigations into the circumstances in which that drug had been administered, concluding in regulatory proceedings being brought by the General Medical Council against Ms Pambakian which resulted in her being struck off the register as a doctor. By 2014 Dr Rogers was reporting to shareholders that the intention was to secure further funding of £2.5 million in order to commission large clinical trials which it was hoped would lead to a licensing deal with a pharmaceutical company which it was hoped might result in an initial payment of £1 billion as well as the payment of further milestone and royalty payments.

19. In June 2013 Dr Rogers turned 70, with the result that the SA automatically terminated. This is potentially relevant since the claimants seek to rely on the provisions of SA in certain respects, whereas the defendants submit that there can be no basis for reliance on its after June 2013. Mr Harper submitted that there was no reason why the SA could not have impliedly been renewed on a consensual basis thereafter, terminable by reasonable notice, in circumstances where Dr Rogers continued to perform her role as chairman. Mr Strelitz riposted that any such continuance would be inconsistent with the fact, as is apparent from the accounts, that Dr Rogers did not draw any remuneration from the Company in the year ending June 2013 or subsequently. Insofar as it matters, and I do not think that it is decisive, resolution of this issue

would depend on further evidence and I cannot at this stage reach any clear view as to how it would be likely to be decided at any trial.

20. In early 2015 Mr Walker resigned, leaving Dr Rogers and Ms Pambakian as the only two remaining directors. At the same time there was a proposal to undertake clinical trials in Brazil. It was apparent from the report and accounts for year end 30 June 2015 that without further funding the planned trials could not proceed.

21. In late 2015 the claimants first became involved with the Company. It was intended that they should provide business advice and assistance in relation to obtaining investment funding. They had a background in finance and they had private equity fundraising experience. They entered into confidentiality agreements and, subsequently, a consultancy agreement with the Company. The latter made clear that their role was to seek out and secure funding for up to £5 million for the testing and marketing of "a drug developed by and registered to the Company, under licence, for the treatment of diabetes and other diseases". The claimants accept (see paragraph 37 of their letter before action) that Dr Rogers informed them at this stage that she was the beneficial owner of all patents.

22. At the same time the claimants each acquired a relatively modest shareholding in the Company. There are issues as to whether or not it was agreed that they should also become directors of the Company and, if so, at whose instigation and for what purpose(s). There are also issues as to whether or not they ought to have received further shares under the consultancy agreement. However, these issues are not ones which I can, or need to, resolve for the purposes of this application.

23. In an email dated 11 August 2016 Mr Glew suggested that input from solicitors and from valuers be obtained as regards a proposed new licence agreement. It is clear that the claimants believed that the current situation, where the 1999 PLA was being held over from year to year, was not a satisfactory vehicle for obtaining long term investment funding and that a new long term licence agreement was required in order to do so. It was perceived to be necessary to demonstrate for investment and tax purposes that the licence agreement was in appropriate terms, both legally - and in particular as regards the right to exploit the IP, and from a valuation perspective to justify the royalty to be paid to Dr Rogers. In his email Mr Glew referred to the importance of establishing that the IP rights had been "properly and fully granted to the Company" in order to satisfy potential investors.

24. A valuation was obtained dated 24 October 2016, which confirmed that the royalty rate of 4.5% proposed was a reasonable one, and which appeared to satisfy Mr Glew.

25. Dr Rogers was reluctant for the solicitors recommended by Mr Glew to produce a draft licence agreement and, instead, she produced one herself. Although it was based substantially on the 1999 PLA there were some key differences. In particular, and as relevant to this case, clause 10 relating to improvements was significantly different, because it provided that: (a) Dr Rogers should have the exclusive right to patent any improvements made by the Company, albeit that

the Company should be entitled to use such improvements for the duration of the agreement; (b) Dr Rogers should own all improvements and know-how, regardless of whether the improvements arose from work carried out by Dr Rogers, the Company or jointly, and even where such improvements arose during the consultancy services which Dr Rogers agreed to provide to the Company.

26. What is rather odd is that neither of the claimants appear to have raised – at least in writing - any concern at the time that these terms did not provide the comfort which they or other investors required. This is notwithstanding that it is apparent from the email written by Mr Glew in August 2016 that he was aware of these clauses. The claimants rather skated over this point in their letter of claim at paragraphs 43 – 47 and in my view paragraph 48 gives a positively wrong and misleading impression in making no reference at all to the contemporaneous knowledge of the claimants as to the offending clauses or their involvement in the circumstances in which the 2016 PLA came to be produced and entered into.

27. There is a dispute as to the role of the solicitors. It is unclear to me at least from the evidence on what basis and by whom they were instructed and what they did. Whilst there is no evidence that they were instructed either by the claimants or by the Company to provide independent legal advice as to the ownership of the IP or as to whether or not the draft PLA properly reflected the interests and requirements of the Company going forwards, nonetheless it is plain that the solicitors had sight of the draft PLA and made a number of amendments to the draft without including any amendments to the provisions of the draft as regards the ownership of the IP going forwards so as to bring them into line with the terms of the 1999 PLA.

28. In November 2016 there was a meeting, attended by Dr Rogers, the claimants and the solicitors they had involved, at which the draft was discussed. The claimants do not suggest that they challenged the terms referred to above. They have said repeatedly that they relied upon representations made by Dr Rogers that she was the rightful owner of the patents. However this does not in my view adequately answer a point of some importance, which is that at the time the claimants either did not believe that the terms of the draft PLA were fatal to the commercial success of the venture in terms of securing new investment or, if that is what they believed, there is no record of their saying so.

29. The end result was that an agreement ["**the 2016 PLA**"] was entered into on 6 December 2016 in substantially the same terms as the draft produced by Dr Rogers. It was signed by Dr Rogers on her own behalf and by Ms Pambakian for the Company, who had been authorised to sign it pursuant to a board meeting attended by Dr Rogers and Ms Pambakian. The patent rights referred to comprised the 2005 patent together with the further patent filed in 2014 ["**the 2014 patent**"] which was described by Dr Rogers in a letter to a shareholder dated 21 November 2016 as being for the oral delivery of one of the Company's products for diabetes and related conditions.

30. Mr Glew states in his second witness statement that the falling out occurred as early as 6 December 2016 and that at that meeting Dr Rogers proceeded to sign the 1999 PLA notwithstanding the claimants complaining in terms that she had failed to renew and extend the 1999 PLA as had been agreed. However, there is so far as I am aware no written record of this. The first relevant letter of complaint appears to be that dated 3 April 2017, written by the claimants to all of the shareholders listed on the register of members of the Company, setting out their "serious concerns relating to corporate governance". This was a detailed and strongly worded letter, containing significant criticism of the defendants in a number of respects. It included complaint about the Company's entry into contracts which "might be considered unfairly prejudicial to the interests of majority shareholders".

31. The defendants' case is that the impetus for this dramatic turn of events was their decision not to renew the claimants' consultancy agreement and not to go along with the claimants' suggestion that they be appointed directors of the Company. They contend that the claimants' complaints were simply a device to seek to obtain control of the management of the Company. The claimants deny this. The defendants make a number of criticisms of the claimants' conduct and, in particular, the aggressive tenor of the wide-ranging complaints made in the letter of 3 April 2017, including but not limited to the reference to the tragic circumstances of the death of Dr Rogers' daughter which, the claimants asserted in the letter, ought to have led to the defendants divesting themselves of control of the Company. I agree that the letter was aggressive in its content and tenor and that the complaint made in relation to the death of Dr Rogers' daughter was insensitive and of little if any relevance to the position in 2017.

32. One particular complaint made by the claimants in their letter was that one effect of the changes to the definition of net sales value was that Dr Rogers would be entitled to receive 4.5% of the sales achieved by sub-licensees, as opposed to 4.5% of the royalty income earned by the Company from such sales. They were also critical of the valuation obtained in 2006, describing it as "wildly unrealistic". Nonetheless, the claimants did not make specific reference in that letter to the ownership of the patents or to the changes made to the PLA as regards the ownership of improvements. It is true however that this point was raised in the claimants' subsequent letter to the defendants of 28 May 2017, written in the context of a forthcoming AGM, in which a complaint was made in terms that, contrary to the terms of the 1999 PLA, the subsequent patents had been applied for showing Dr Rogers as owner. The claimants went so far as to demand an explanation as to why that did not amount to the shareholders of the Company being "defrauded of their interest in … the Company's IP".

33. As the minutes of the 2017 AGM held on 30 May 2017 make clear the claimants ventilated their complaints at the AGM. The meeting was attended by a solicitor, a Mr Charnley of a firm known as King and Spalding. The minutes recorded that the directors intended to instruct that firm to undertake a review of the Company's IP "in the near future". The claimants are recorded as saying that they had been asking for nearly a year about the ownership of IP but had received no answers. They were asserting that the provisions of the 1999 PLA as regards the ownership of the IP had not been adhered to.

34. Further criticisms of the defendants were levied in the claimants' letter of 28 June 2017, written following the AGM. In that letter the claimants were effectively seeking to achieve the removal of the defendants from the board and their replacement by an independent board together with the defendants agreeing to address the other complaints and agreeing to reduce the family shareholding to below 75% in order, as the claimants saw it, to achieve further investment to allow the Company to succeed.

35. The minutes of the 2018 AGM of the Company revealed that no progress had been made. In particular the claimants point to the fact that Dr Rogers stated that the directors had decided not to proceed with the legal review of the Company's IP which had been promised at the 2017 AGM. What is sadly evident from the tone of the minutes is that whilst everyone appeared to agree that, until the disputes between the claimants and certain other minority shareholders on the one hand and the defendants as directors and majority shareholders on the other hand were resolved, it was realistically impossible for the Company to raise funds and make progress, no compromise seemed to be achievable. Indeed, there is an email from the company which had been interested for some time in undertaking clinical trials in Brazil in which precisely the same point was made.

36. The reports for the year ended 30 June 2018 recorded that the Company remained unable to proceed to planned trials or new initiatives without further funds, adding that "without further funding within 12 months of signing [December 2018] the company is likely to become insolvent". It also referred to receipt of a letter before action from the claimants, saying that whilst it was believed the claim had no merit the disruption caused if permission was granted "may put the company at risk of insolvency".

37. The letter before action is that dated 22 August 2018. It included reference to the matters contained in the current claim as well as reference to various matters which did not feature in the claim as issued. It made clear that the principal relief claimed related to the complaints about the ownership of the IP generated since 1999 and to the complaints about the changes in that regard going forwards as introduced by the 2016 PLA. The defendants having after some delay instructed solicitors those solicitors provided a substantive response dated 16 November 2018. I do not propose to seek to summarise the welter of allegations and counter-allegations which were exchanged in the course of this and subsequent correspondence. It does not make edifying reading and I have no doubt that the whole process has been extremely time-consuming and expensive for both parties. I have been referred by both counsel to certain parts of the correspondence, which they submit support their respective case or detract from the case as advanced by the other side, and I take such matters into account as appropriate.

38. The claimants have provided a number of witness statements from other minority shareholders who indicate that they support the claim. These witness statements were made on various dates, principally in November or December 2018. The majority are either in the same or substantially the same terms and were clearly produced as a template by the claimants' solicitors for the witnesses either to sign unamended or to make amendments as they thought fit. They all say that they have been shown the draft Particulars of Claim, but do not make

reference to having been shown the pre-action correspondence including the defendants' response. Hence it cannot be assumed that they had seen the defendants' response to the claim. Nonetheless, there is no reason to believe that the statements do not represent the genuine view of those who made them.

39. On 15 March 2019 Dr Rogers wrote to all shareholders setting out her response to the allegations raised by the claimants. She suggested that until the legal dispute was resolved it was impossible to secure investment and that unless it was resolved within a matter of months the Company would "no longer be a going concern". She asked shareholders to provide written confirmation that they did not support further action. It would appear that the only response she received was from two individual shareholders, a Mr Adrian Wigan and a Mr Michael Wigan. This does rather indicate that there is no great groundswell of support for the defendants from the minority shareholders.

40. That concludes my summary of the facts and I now turn to address the relevant legal principles.

B. Relevant legal principles

41. There was no dispute of any substance as to the relevant legal principles to be applied, which are to be found in ss.260 - 263 CA 2006 as explained by subsequent case law, most comprehensively in the judgment of Lewison J in *Iesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch).

42. It is common ground that the claimants are members of the Company and, thus, have standing to bring the claim under s.260(1). It is also common ground that the claim is one for relief on behalf of the company in respect of a cause of action arising from alleged breaches by a director of the Company and, thus, falls within s.260(3).

43. The court must not grant permission if it is satisfied that a person acting in accordance with s.172 CA 2006 (duty on company directors to promote the success of the company) would not seek to promote the claim: s.263(2)(a). This mandatory ground was considered by Lewison J in *Iesini* where he said this:

> "85. As many judges have pointed out (e.g. Warren J in *Airey v Cordell* [2007] BCC 785, 800 and Mr William Trower QC in *Franbar Holdings Ltd v Patel* [2009] 1 BCLC 1, 11) there are many cases in which some directors, acting in accordance with section 172, would think it worthwhile to continue a claim at least for the time being, while others, also acting in accordance with section 172, would reach the opposite conclusion. There are, of course, a number of factors that a director, acting in accordance with section 172, would consider in reaching his decision. They include: the size of the claim; the strength of the claim; the cost of the proceedings; the company's ability to fund the proceedings; the ability of the potential defendants to satisfy a judgment; the impact on the company if it lost the claim and had to pay not only its own costs but the defendant's as well; any disruption to the company's activities while the claim is pursued; whether the prosecution of the claim would damage the company in other

ways (e.g. by losing the services of a valuable employee or alienating a key supplier or customer) and so on. The weighing of all these considerations is essentially a commercial decision, which the court is ill-equipped to take, except in a clear case.

86. In my judgment therefore (in agreement with Warren J and Mr Trower QC) section 263 (2) (a) will apply only where the court is satisfied that *no* director acting in accordance with section 172 would seek to continue the claim. If some directors would, and others would not, seek to continue the claim the case is one for the application of section 263 (3) (b). Many of the same considerations would apply to that paragraph too."

44. s.172 CA 2006 provides that:

"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to—

(a) the likely consequences of any decision in the long term,

(b) the interests of the company's employees,

(c) the need to foster the company's business relationships with suppliers, customers and others,

(d) the impact of the company's operations on the community and the environment,

(e) the desirability of the company maintaining a reputation for high standards of business conduct, and

(f) the need to act fairly as between members of the company.

(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."

45. A further mandatory ground for refusing permission is where the court is satisfied that the act or omission complained of was authorised by the company before it occurred: s.263(2)(c)(i). Although Mr Strelitz had submitted that this provision applied here, he was unable to point to any authorisation by a properly constituted general meeting of shareholders. I am satisfied that there is no prospect on the evidence before me of the defendants making out this mandatory ground.

46. In making its decision the court is required to take into account the particular factors identified in s.263(3), although this is not said to be an exhaustive list of the potentially relevant considerations. I refer now to those said to be relevant in this case.

47. Whether the member is acting in good faith in seeking to continue the claim: s.263(3)(a). Lewison J analysed this factor in *Iesini* at [115] to [120] by reference to the earlier authorities and to the wording of the sub-section. At [121] he considered the position where the claim was brought partly for the benefit of the company and partly for other reasons. He concluded that the pertinent questions to consider were whether the dominant purpose of the claim was to benefit the company and whether, but for the collateral purpose, the claim would not have been brought at all. At [122] he recorded that a person may be prevented from bringing a derivative claim if he had participated in the wrong of which he complains.

48. The importance that a person acting in accordance with section 172 (see above) would attach to continuing the claim; s.263(3)(b). The factors identified by Lewison J in *Iesini* at [85], referred to above, are of course relevant to this factor.

49. The merits of the case are plainly relevant to this discretionary ground. Lewison J considered in *Iesini* at [79] to what extent the court at this stage should investigate the strength or weakness of the case. He said this:

> "79. However, in order for a claim to qualify under Part 11 Chapter 1 as a derivative claim at all (whether the cause of action is against a director, a third party or both) the court must, as it seems to me, be in a position to find that the cause of action relied on in the claim arises from an act or omission involving default or breach of duty (etc.) by a director. I do not consider that at the second stage this is simply a matter of establishing a prima facie case (at least in the case of an application under section 260) as was the case under the old law, because that forms the first stage of the procedure. At the second stage something more must be needed. In *Fanmailuk.com v Cooper* [2008] EWHC 2198 (Ch) Mr Robert Englehart QC said that on an application under section 261 it would be "quite wrong … to embark on anything like a mini-trial of the action". No doubt that is correct; but on the other hand not only is something more than a prima facie case required, but the court will have to form a view on the strength of the claim in order properly to consider the requirements of section 263 (2)(a) and 263 (3)(b). Of course, any view can only be provisional where the action has yet to be tried; but the court must, I think, do the best it can on the material before it."

50. Whether the act or omission complained of gives rise to a cause of action which the member could pursue in his own right: s.263(3)(f). The cause of action most commonly identified is an unfair prejudice petition under s.994 CA 2006. This was considered in two cases to which my attention has been drawn. The first is the decision of Roth J in *Stainer v Lee* [2010] EWHC 1539 (Ch), where he referred at [51] to the "fundamentally different nature of the two forms of proceedings", emphasising in particular that under s.994 what a petitioner really wants is to be bought out, as opposed to seeking a remedy on behalf of the company for misconduct by its directors. The second is the decision of HHJ Cooke sitting as a High Court Judge in *Hook v Sumner* [2015] EWHC 3820 (Ch). That case is relied upon here by Mr Harper because the judge also considered, in the context of the particular facts of that case, an argument by the defendants that if permission was granted they would simply stop work and the company

would obtain no future income. This part of his judgment is at [107] – [109]. He concluded that it was necessary to take a commercial view as to whether or not the potential benefits from the continuation of the action (including the prospect of settlement) outweighed the potential damage to the company from the risk of the defendants downing tools.

51. s.263(4) provides that: "In considering whether to give permission (or leave) the court shall have particular regard to any evidence before it as to the views of members of the company who have no personal interest, direct or indirect, in the matter." Both parties rely upon the discretionary factor here.

C. Evaluation of the strength, size and importance of the claims

52. In my judgment these factors are of critical importance in this, as in many, cases. The claims are those set out in the Particulars of Claim, bearing in mind that the case as pleaded is not necessarily set in stone at this stage. Without undertaking an unnecessarily lengthy analysis of that statement of case it is possible to identify the following substantive claims:

53. A claim ["**the IP claim**"] that the 2005 and 2014 patents and all other IP relating to improvements under the 1999 PLA and the 2016 PLA are property to which the Company and not Dr Rogers is legally and beneficially entitled [paragraph 25.4] on the basis that: (a) this was so on a proper interpretation of the 1999 PLA and the circumstances in which the 2005 and 2014 patents and improvements came to arise; (b) this ought also to have been so for the future had the 2016 PLA adopted the same terms as the 1999 PLA as it ought to have, had the defendants properly complied with their duties as directors.

54. A claim ["**the alternative IP consequential loss claim**"] that if the 2005 and 2014 patents and all other IP relating to improvements under the 1999 PLA are not property to which the Company rather than Dr Rogers is legally and beneficially entitled, then the Company has suffered loss because of the defendants having caused the Company to act on the basis that it was so entitled, and specifically:

    (1) The Company has applied for and obtained tax relief for R&D in the sum of circa £668,000 which "may be inappropriate on the grounds that the Company had not conducted such R&D on its own behalf in relation to IP which it owned", in which case the Company could incur a significant tax liability [paragraph 25.8.1]; and

    (2) Dr Rogers and Ms Pambakian ought to have submitted tax declarations for benefits in kind on the basis that Dr Rogers was the "sole personal beneficiary" of the R&D expenditure of circa £8.2 million by the Company and of the monies expended for patent registration and maintenance, and that any tax assessment "could be" assessable on the Company as well as Dr Rogers [paragraph 25.8.2]; and

    (3) Dr Rogers and Ms Pambakian had caused the Company to submit EIS declarations against which investors in the Company had successfully claimed EIS reliefs which, if

inappropriate, would lead to them suffering loss in respect of which the Company would be "likely to face claims" [paragraphs 25.9 and 25.10].

55. A claim ["**the excessive royalties claim**"] that the royalties which will be payable to Dr Rogers in case of any future sub-licences by reason to the drafting changes made in the 2005 side letter and the 2016 PLA are disproportionate and excessive [paragraph 31(a),(b),(f) and (g)].

The strength, size and importance of the IP claim

56. This claim has two logically separate, albeit connected, limbs. The first complaint in chronological terms is that the 2005 and 2014 patents ought not, given the terms of the 1999 PLA and the SA and the circumstances in which the inventions the subject of the patents came to be discovered, to have been applied for and granted in the name of Dr Rogers as opposed to the Company ["**the patents ownership claim**"]. The second complaint chronologically is that the defendants were responsible for making material changes to the terms of the 2016 PLA when compared with the 1999 PLA in relation to the ownership of improvements which were materially and manifestly disadvantageous to the Company when compared with the 1999 PLA ["**the improvements ownership claim**"].

The strength of the patents ownership claim

57. In my view, whilst neither the claimants nor the defendants have produced decisive evidence on this issue, the claimants appear to have the better of the arguments on the basis of the evidence before me.

58. Thus the claimants' case is predicated on: (a) their case as to the wide-ranging entitlement of the Company to the IP in the improvements under the 1999 PLA by reference to a proper construction of the terms of the 1999 PLA and the terms of the SA; (b) inference from the evidence that it was the Company which funded the R&D, including clinical trials, which has resulted in the improvements and thus the discovery of the IP; (c) their case that the involvement which Dr Rogers had in such respects can only have been in her position as consultant to the Company; and (d) the absence of any detailed evidence from Dr Rogers to the effect that she discovered the IP in circumstances in which she would clearly be entitled to ownership under the terms of the 1999 PLA.

59. These are all strong points in my judgment. However the claimants have not yet, whether themselves or through expert evidence, provided a detailed explanation as to how the inventive processes the subject of the patents arises out of the subject matter of the R&D as funded by the Company since 1999 and Dr Rogers' contributions thereto and as to how that inventive process falls within the scope of the definition of improvements.

60. In contrast the defendants' case is predicated on: (a) an interpretation of the 1999 PLA and a submission that the SA is either of no real assistance to the claimants in relation to the position

before 2013 and not in force after that date; (b) her evidence as to the circumstances in which the improvements the subject matter of the Patents were discovered.

61. In my view the defendants' case as to the interpretation of the 1999 PLA and rejection of the relevance of the SA is not particularly compelling. In my view it does not follow from the fact that the 1999 PLA envisages that there may be circumstances in which improvements as defined will nonetheless result from Dr Rogers' own work alone that it must also have been envisaged that this could occur in any, let alone a wide variety of, circumstances, including all circumstances in which the discovery was made by Dr Rogers working alone in her study one evening or weekend. It is not necessarily sufficient in my view for the claimants to say that because: (a) the material which was the basis for the inventive process was commissioned and paid for by the Company; (b) Dr Rogers was engaged as a consultant for the Company at the time, it must follow beyond argument that the inventive process must have arisen from its work so as to be its property under the 1999 PLA.

62. Nonetheless it is clearly the case in my judgment that Dr Rogers, as the person who knows most about these matters, has failed to adduce convincing detailed evidence as to the circumstances in which the improvements are said to have been discovered by her acting alone and not under the SA. Given the wide definition of improvements in the 1999 PLA the crucial question in my view is whether or not the inventive processes the subject matter of the patents are: (a) improvements, modifications or adaptations to any part of the existing IP; and (b) whether they might reasonably be of commercial interest in the development of the (widely defined) products. My assessment at this stage is that, given the wide terms of the provisions relating to improvements and given that Dr Rogers has not clearly explained how the inventive processes the subject of the patents are completely unrelated to the earlier patent or of no commercial interest in the development of the products, the defendants will face an uphill battle at any trial in making good their case.

63. Moreover, Mr Harper drew to my attention the plainly erroneous argument by the defendants' former solicitors, in their pre-action letter of response, that the 1999 PLA provided for Dr Rogers to have ownership of any improvements and the further explanation that insofar as the 1999 PLA and the SA did not reflect the true intentions of the parties those intentions were more clearly recorded in the 2016 PLA. He submitted that this might well provide the explanation as to why Dr Rogers acted as she did, both as regards applying for the subsequent patents in her own name and as regards the changes to the definition of improvements in the 2016 PLA. I accept the force of this forensic submission.

64. However, there some factors which militate against the claimants' case. The most significant, in my view, is that no-one, and Mr Walker in particular as the non-family board member and the finance director, appears ever to have challenged Dr Rogers' applications to register the patents in her own name rather than in the name of the Company and nor did the claimants appear to have challenged in 2016 her statement, in the context of the terms of the draft 2016 PLA, that she was the owner of the patents. Whilst it may be said that the former was because Mr Walker was kept in the dark, and the latter was because the claimants were unaware of the

true position in 2016, resolution of these issues would depend on an examination at trial of the evidence of the claimants and Mr Walker, and might turn out to be significant points in the case, insofar as there are live disputes of fact as to whether or not the improvements were or were not, given their nature and the circumstances of their discovery, to be the property of the Company or of Dr Rogers under the terms of the 1999 PLA and the SA.

65. There is a further issue to which Mr Strelitz drew my attention, which is that a claim under s.37 of the Patents Act 1977 to determine who is the true proprietor of a patent is subject to a strict 2 year limitation period from the date of grant of the patent, unless it is shown that the registered proprietor knew at the time of the grant that (s)he was not entitled to it. No submissions were made to me on the question as to whether that means actual and subjective knowledge or constructive or objective knowledge, although the former would appear more likely on the basis of the wording alone. Even if constructive or objective knowledge is sufficient, that is manifestly a further hurdle for the claimants to surmount in any claim that the Company ought to be registered as proprietor of the patents. I accept however Mr Harper's submission that this would not appear to bar the claim by the Company that it ought to be declared to be at least the beneficial owner of the IP. Indeed Mr Harper went further and submitted that the Company could deploy the ancillary terms of the 1999 PLA and SA to obtain an order requiring Dr Rogers to transfer the patents to the Company without having to ask the court to exercise its declaratory jurisdiction in relation to the ownership of patents, but that is not a matter on which I was referred to authority and I do not think that I can express a clear view on the point one way or another. It suffices to say that these are plainly obstacles to a successful claim which cannot summarily be discounted.

66. Moreover, it must be borne in mind that the answer to the question is not a simple binary one, i.e. that the patents either belong to Dr Rogers or to the Company. As provided by clause 10.5 of the 1999 PLA, if the IP in improvements arose from work carried out jointly by them it would be jointly owned. Although the claimants also sought to rely on clause 11.5 of the SA in support of an argument that even if the IP belonged to Dr Rogers the Company had the right to be notified of it and to exercise a right to acquire it from her, that would be a very different claim from the one actually advanced.

The strength of the improvements ownership claim

67. Again, I consider that the claimants have the better of the arguments, at least in terms of their principal complaint. It cannot be gainsaid that the relevant terms of the 2016 PLA are less favourable to the Company than those of the 1999 PLA, since Dr Rogers obtains the right to all improvements, even if they emanate from R&D undertaken or commissioned and paid for by the Company and even if they are discovered by her whilst working as a paid consultant to the Company. Although there is clear evidence, to which I have referred above, that both the claimants and the solicitors who they introduced were aware of these terms, there does not appear to be any equally clear evidence that they were aware that these terms differed materially from the terms of the 1999 PLA. Moreover, there is no suggestion that the changes were the subject of communication to or informed consent from the other shareholders. It

would appear from the evidence either that Dr Rogers took the view that the 1999 PLA had the same effect, even though it plainly did not, or she took the view that the 1999 PLA did not reflect the rights which she wanted to have over all IP arising from improvements and that the 2016 PLA should be drafted so that it accorded with what she wanted.

68. What was not the subject of specific submission during the hearing and what I am less sure about is what remedy would be available to the Company against the directors for causing the Company to enter into the 2016 PLA on less favourable terms than the 1999 PLA on the assumption that the court also found that this amounted to a breach of their duties as directors to the Company. The question is whether the court would have jurisdiction to declare, as is pleaded, that the terms of the 2016 PLA are either invalid or unenforceable, or that the Company is legally and beneficially entitled to all improvements made under the 2016 PLA, as is sought by the Particulars of Claim. If not, then it would appear that the only remedy available to the Company would be an award of damages or equitable compensation, which at present would appear to be entirely speculative. In his skeleton argument Mr Harper suggested that the consequence of findings in favour of the Company would be that the 2016 PLA would be voidable at the election of the Company; however even if that is what happened the consequence would simply be that the position would revert back to the 1999 PLA continuing on a rolling basis, which of course is what the claimants believed made the Company unattractive to investors in 2016. Whilst the minority shareholders might be able to pursue a s.994 claim on the basis that the defendants' conduct in executing the 2016 PLA in the terms they did and their refusal to unwind the transaction and enter into a new PLA on the same terms as the 1999 PLA was unfairly prejudicial to them, that of course is not the proper subject of a derivative claim.

The size and importance of the IP claim

70. It is clearly important when considering whether or not permission should be granted to attempt to ascertain the commercial value and benefit to the Company of pursuing the IP claim. No reasonable director would consider it worthwhile pursuing even a strong claim unless the benefit to be achieved justified the time, cost, risk and trouble. The claimants contend that the IP claim is of significant value and importance in two respects. The first is that unless the Company is the owner of the IP it will be unable to attract external investment to proceed to the next stage of clinical trials and thus proceed to bring the product to market. The second is that the IP has significant value in its own right as an asset which the Company is entitled to and should own, legally and/or beneficially.

71. However, I have struggled to find clear and compelling evidence from the claimants in support of either contention, save in the most general of terms. Thus:

    (1) Whilst Mr Glew refers, at paragraph 26 of his first witness statement, to the IP being the most valuable asset which the Company possesses, he does not provide any details or explain the difference between the value of the rights of full ownership and the value of

the rights under the 1999 and 2016 PLAs. The same lack of detail is apparent in paragraph 40.

(2) Whilst Mr Glew refers, at paragraph 103 of his first witness statement, to the defendants' conduct and the terms of the 2016 PLA as preventing the Company from being an "investable proposition" and, at paragraph 108, to the alleged misappropriation of the IP as being in his view the primary barrier to the Company raising new funding, again he does not provide any details or explanation as to the difference between the value of the rights of full ownership and the rights under the 1999 and 2016 PLAs (other than to refer to the excessive royalties claim, which is a separate issue and which I deal with separately below).

(3) Whilst Mr Glew's evidence is supported by Mr Walker who, referring to the discussions in 1999, said at paragraph 18 that if the Company did not own the IP that would have "negated" any possibility of fundraising, again that is a general statement and there is no positive evidence that Dr Rogers' ownership of the 2005 patent was a bar to further fundraising or that Mr Walker ever expressed himself in these terms at any time prior to his departure as a director and active participant in the Company in 2015.

72. Moreover, and importantly, there is no independent evidence from a valuer or from an investment adviser or from an interested investor to the effect either that: (a) the IP in itself has a substantial intrinsic value as an asset notwithstanding that the right to exploit the IP is enjoyed by the Company until it reverts back to Dr Rogers at the end of the 15 year term of the PLA, or that; (b) the Company's entitlement to the use of the IP without legal and/or beneficial ownership of the IP or any future improvements is in itself a real and insuperable impediment to securing substantial investment from external investors.

73. This omission cannot be explained by simple inadvertence, since the defendants' then solicitors observed in their letter of 18 January 2019 at [6] that the claimants had failed to show that "prospective investors have been discouraged from investment by the alleged dilution of the Company's rights as licensee".

74. Furthermore, I do not regard it as self-evident that Dr Rogers' "reversionary interest" in the IP has a significant value in itself. It must be remembered that patents, having a 20 year validity, are by definition wasting assets. What the Company needed in 1999 was the right to exploit the existing IP and any future improvements to the IP for a sufficiently long period to be able to develop and sell the products. Under the 2016 PLA, just as much as under the 1999 PLA, the Company has the exclusive right to use the patents and know-how (including – as appears from the definition of patent rights – any additional patents) for the same minimum 15 year term. Only the Company has the right to terminate before the minimum 15 year term had expired, save in case of insolvency.

75. And finally, as I have already said, the claimants clearly did not see Dr Rogers' ownership of the existing IP as an obstacle at the time they acquired their shareholding and entered into the

consultancy agreement with the Company, based on their expectation of securing funding. Their primary concern at the time was that the fixed term of the 1999 PLA had expired and that what was needed was a further long term PLA which gave potential investors sufficient assurance that the Company could safely proceed to develop and bring the product to market to enjoy a satisfactory return over the minimum term of the PLA and beyond, as they said in their letter of claim at [39].

76. It follows in my judgment that the claimants have failed to establish that the IP claim, whilst reasonably strong on my assessment of its merits, is either of substantial value as a claim in monetary terms or of real importance to the Company going forwards when compared with the position which it is already in under the existing 2016 PLA. This is plainly a very significant factor when deciding whether or not permission should be granted.

The strength, size and importance of the alternative IP consequential loss claim

77. This claim is pleaded expressly as an alternative to the claimants' primary case.

78. The defendants argue that this claim is misconceived, since the Company was properly entitled to undertake R&D in reliance upon the rights granted to it under the 1999 PLA, so that: (a) there is no question of the Company having improperly applied for and obtained tax relief; (b) the expenditure incurred by the Company was indeed for its benefit; and (c) the shareholders were entitled to claim EIS. In particular, the defendants draw attention to the position adopted by HMRC which was, they say, that: (a) before 2009, whilst there was an ownership requirement, that requirement was satisfied by reason of the rights granted under the 1999 PLA, because all that was required was that a company must have the potential to exploit the IP if it has use or value; (b) after 2009 there was no ownership requirement and, hence, no possible basis for challenge.

79. It is apparent that this case had not been fully investigated at the time the claim was issued, doubtless because it was pleaded very much as an alternative and in the qualified terms I have noted above. In paragraph 46 of his first witness statement Mr Glew rightly anticipated that such a claim would need proper underpinning to succeed, whether - as he suggested - by expert tax or accountancy evidence or otherwise, to support the case made both in terms of whether or not the approach taken by the Company was correct and the quantification of any claim. Moreover, as Mr Strelitz submitted, the claimants did not appear to have grappled with the objection that the treatment by the Company was not the subject of any adverse comment by Mr Walker or by the Company's auditors from 1999 onwards, and nor did it seemingly occur to the claimants themselves in 2016 (and where Mr Glew was an accountant with 28 years' experience) that given Dr Rogers' ownership of the patents it was not appropriate for the Company to be making these claims or taking this approach.

80. In his second witness statement Mr Glew recorded that since seeing Dr Rogers' witness statement in response he had taken advice from a tax lawyer on these points. However, he did not produce a copy of the advice and expressly declined to waive privilege in its content.

Nonetheless he continued to comment extensively and in some detail in his statement on the risks to the Company, saying that he felt it appropriate to do so based on his "experience", even though he accepted that he was not a tax expert, and his "enquiries", which seems clearly to be a euphemism for the advice he has taken which he is not prepared to disclose or to waive privilege in. In my view it is rather difficult for the court to place any real weight on that evidence in those circumstances.

81. In the circumstances it is also rather difficult to see how this case which it is sought to be brought against the defendants for breach of directors' duty can be thought to be anything other than essentially speculative. If the claimants' fears proved to be well-founded and if, as a result of the approach taken by Dr Rogers, it became clear that substantial losses would be or were actually suffered by the Company, whether as a result of claims by HMRC or by claims by investors or otherwise, then if the Company's position justified bringing a claim against the defendants as directors at that stage such claims might possibly be justified. However, there is no basis in my judgment for the claim to be advanced at this stage and nor is there any clearly demonstrated basis for the court to adjourn consideration of the application in respect of this claim.

The strength, size and importance of the excessive royalties claim

82. This claim depends initially upon the proper construction of the definition in question. I can see that the construction proposed by the claimants is tenable. However, there is no evidence so far as I am aware that the claimed effect of the changes to the definition of net sales value was ever intended by Dr Rogers, as opposed to being an unintended consequence of the wording used.

83. It was submitted by Mr Strelitz that Dr Rogers had always made it clear that she would never seek to contend that this was the effect of the alteration, if the point ever came where a product was developed and sales achieved by a sub-licensee. To put the matter beyond doubt I suggested that she might offer an undertaking and, after taking instructions, Mr Strelitz relayed to me that she was prepared to offer an undertaking that she would not seek to assert otherwise than as follows in respect of the 2016 Patent Licence Agreement: namely that her royalty rate under that licence agreement is 4.5% of the 'Net Sales Value' royalty received by the Licensee from sub-licensees or further sub-licensees thereof; or, where the Licensee transacts any sale then 4.5% of the 'Net Sales Value' from the Licensee's own sales.

84. There was no suggestion by Mr Harper that this was unsatisfactory and, in the circumstances and with that undertaking to be recorded in the minute of order which disposes of this matter, that means that there is no proper basis for granting permission as regards this head of claim.

D. Consideration of the relevant factors

85. It is convenient to consider s.263(2)(a) and s.263(3)(b) CA 2006 together, since both require the court to consider whether the hypothetical director acting in accordance with s.172 CA

2006 would continue the claim by reference to the importance which he or she would attach to doing so.

86. Notwithstanding the low bar which is set by s.263(a) I am satisfied, for the reasons I have given above, that the mandatory ground for refusal is made out in relation to the alternative IP consequential loss claim and, given the undertaking which Dr Rogers will give, the excessive royalties claim.

87. The IP claim requires a careful consideration of the factors relevant to the decision by the hypothetical director. Clearly my finding that on the evidence before me the IP claim, whilst reasonably strong on the merits, has not been shown to be of substantial value or importance to the Company, is a significant one in this context.

88. A director would also consider the cost of the proceedings and the Company's ability to fund the proceedings. I have no doubt that the prosecution of the IP claim would be complex and expensive, even if prosecuted with an eye on time and cost and with the benefit of active case and costs management by the court. On the basis of the evidence and arguments examined at the hearing before me it would involve an investigation into the circumstances of the discovery of the inventive processes leading up to the applications for the 2005 and 2014 patents, which would involve an investigation into the history of the R&D undertaken by the Company from 1999 up to 2016, as well as an investigation into the circumstances in which the 2016 PLA came to be entered into. It would be necessary to consider the conduct of the defendants, and Dr Rogers in particular, to decide whether or not there was any breach of directors' duties and if so which and on what basis. It would also be necessary to consider with some care the appropriate remedy or remedies to which the Company was entitled, bearing in mind in particular the limitation period applicable to claims under s.37 Patents Act 1977. There are plainly a number of disputed issues of law and contract construction as well as issues of fact to consider. It is difficult to see how the IP claim could be resolved without extensive disclosure and witness evidence and, possibly, expert evidence, and without a trial of perhaps a week's duration. I would not have thought it likely that the whole process could be concluded within 12 months at the very earliest and probably longer.

89. Whilst of course the Company will only be required to fund the litigation if it is ordered to indemnify the claimants against the costs of the claim, either on a final basis or on a final and interim basis, the authorities such as *Iesini* indicate that the starting point is that where the court has determined that the claim should properly be brought as a derivative claim for the benefit of the Company it is ordinarily appropriate for an indemnity to be ordered. There has been some dispute as to the current financial position of the Company. In particular, there has been some question as to the fact that asserted expenditure on patent protection in the last 18 months has been significantly in excess of expenditure for such purpose in the previous two financial years. However both from the most recent accounts and from the bank statements produced disclosing the more recent position it is clear that its position is and has been for some time now poor. Whilst its expenditure is relatively low, it is not in receipt of any income,

not surprisingly since the only way it can generate income is by developing and exploiting the product.

90. The Company has been unable to raise funds for some time now and, whatever the reason or reasons for that difficulty, there is no indication that it will change in the short or medium term. It is common ground, and in any event clear, that there is no possibility of securing further investment into the Company whilst this dispute is ongoing. Although the claimants have offered to fund the cost of patent protection for 12 months on the basis of historical expenditure as revealed by the accounts, they have not undertaken to fund all reasonably necessary expenditure required by the Company, including the cost of this litigation up to judgment, to ensure that the Company does not become insolvent prior to that time. Whilst I do not criticise them for not so undertaking, nonetheless the only conclusion I can reach is that in all of the circumstances it is quite clear that the Company is not in a position to fund extensive and expensive litigation such as the claimants wish to commit it to bring.

91. Are the defendants in a position to satisfy any judgment? This issue is perhaps less important than in many cases since the remedy which the claimants seeks as regards the 2005 and 2014 patents is a vesting or declaratory remedy and since the claimants are also seeking declaratory relief in relation to the 2016 PLA. However if and insofar as these proprietary or declaratory remedies are not available, and if it is said that the consequence of the defendants' conduct is such as to have caused the Company substantial loss, there is no evidence of the defendants having independent wealth such as would enable them to pay substantial amounts, unless the Company itself successfully developed and exploited the products which, logically, would not be the case in such a hypothesis.

92. What about the disruption to the Company in the meantime? I have already said that without funding the Company cannot move forwards and whilst the dispute continues funding cannot be obtained. Mr Glew himself said in paragraph 48 of his first witness statement that until this issue is resolved the Company cannot move forwards to raise new funds.

93. It follows that if I grant permission the Company cannot move forwards until the dispute has been finally resolved. This dispute has already lasted for around 2 ½ years so far. In my judgment it is not in the interests of the Company that it should be stymied for a further significant time period in the absence of the clearest of evidence that there will be a significant benefit to the Company in pursuing the IP claim. If I refuse permission then the Company can move forwards and, in the absence of compelling evidence that it will be unable to raise funds due to the terms of the 2016 PLA, as to which there is none, it can do so on a clear basis.

94. Although the claimants can and do say that the evidence shows that the Company has been unable to move forwards for some considerable time anyway and regardless of this dispute, I do not regard this as a sufficient answer. By refusing permission at least one bar to moving forwards falls away. If, contrary to the view I have taken on the evidence before me, Dr Rogers' ownership of and entitlement to own further IP by Dr Rogers is a bar to further investment, then it would appear that the defendants would be cutting off their own noses to

spite their faces in refusing to take steps to resolve that bar. I acknowledge the risk that they might do so. However the plain fact is that for the last 2 ½ years this dispute and the uncertainty it has caused have stopped the Company from moving forwards and it is not desirable that this should continue for a further period unless clear and compelling reasons for doing so are shown, which they have not in my view. If the claimants also say, as they have done, that the continued management of the Company by the defendants is preventing it from moving forwards regardless of this dispute, that is not a proper aim of or justification for this derivative action.

95. For completeness, whilst there was some debate at the hearing about whether or not Dr Rogers would be prepared to devote time and money into the Company if permission was granted or if the substantive relief sought was obtained, I place no weight on this as a factor. If there is a strong claim, which the company ought to be pursuing against a delinquent director, then it is unlikely in my view that a threat by the director to walk away from the company out of pique will carry much weight with a court. That is particularly so in a case such as the present where, as I observed in argument, the only way that anyone will get any money out of the Company is if it develops a successful product, and the only way that will happen is if investment can be obtained. Since Dr Rogers will receive 4.5% royalty on any sales, and since the defendants and their family interests will receive in excess of 75% of any dividends, it would make no commercial sense for her to walk away even if permission was granted or the case succeeded. Since she also states that what has always motivated her as much as, if not more than, financial reward is to develop a successful cure for diabetes it is in her wider interests for the Company to succeed as well.

96. Having had regard to all of these factors relevant to the exercise of the discretion by the hypothetical director under s.172 CA 2006 I have decided – albeit with some hesitation – that I am satisfied that no such director would seek to continue the claim. In my judgment no reasonable director acting in accordance with s.172 could consider, notwithstanding the strengths of the IP claim, that it was in the interests of the Company to proceed with the claim notwithstanding the lack of clearly identified benefit and regardless of the problems that would cause the Company in the meantime. In any event I have also decided – with no hesitation at all – that considering all of the relevant factors a clear majority of such directors would conclude that it was not appropriate to risk the future success, and indeed the survival, of the Company by bringing a claim where it could not clearly be shown that its success would place the Company in a significantly better position than it would be in had the claim not been made.

97. As regards s. 263(3)(a) and s.263(3)(f), is in my judgment this is a case where the good faith of the claimants and the other remedies available to them and the other minority shareholders are of some, albeit not decisive, significance. I do not accept the defendants' submission that the claimants are acting in bad faith in that they are pursuing the claim entirely or principally for collateral purposes, or that they have acted in wholesale breach of their duties to the Company under the confidentiality agreements they entered into. Nor do I accept the submission that this is a clear case where a s.994 unfair prejudice claim is obviously the only appropriate remedy. However it is apparent to me, having read the voluminous correspondence and the witness

statements, that the claimants are clearly convinced that the defendants have acted in a significant number of ways contrary both to the interests of the company as a whole and to their own interests as shareholders who expected to be closely involved in driving the Company forwards to a successful future. They have made a significant number of complaints and have expressed themselves in strong and, I am satisfied, intemperate terms on a number of occasions. It is clear from the correspondence of 28 June 2017 and following that whilst the claimants' original aim was simply to persuade the defendants of the need to appoint themselves or others with suitable financial and business experience to the board, their ultimate aim has become to persuade the defendants to step down from management and, if possible, to buy them out as shareholders. In my assessment they are clearly influenced in part in bringing this litigation as a means to achieving these ultimate goals. These are relevant considerations even if, as the claimants are concerned that I record, the way in which the defendants have acted and expressed themselves are also capable of heavy criticism.

98. If the IP claim was not only a compelling case on the merits but also one which clearly needed to be brought, either because of the intrinsic reversionary value of the IP or because it was necessary for the IP to be brought under the Company's control to enable it to obtain external investment, or because without the dispute being resolved in its favour the Company could not otherwise move forwards, then these considerations would not have been fatal. But, given the views which I have formed about these matters, then the fact that the claimants are not proceeding purely through disinterest, where their ultimate ambition is either to secure the removal of the defendants from control or to obtain a buy-out, and where it would be at least feasible to pursue those claims in a s.994 action where permission could also be sought to include this claim, then these are factors which militate against granting permission.

99. Finally, I am required by s.263(4) to consider the evidence as to the views of the other members of the company who have no personal interest in the case. I do not regard the evidence on this point as particularly significant one way or another. That is because whilst it is clear that the defendants have been unable to assemble any real support from the minority shareholders, it is also clear that the claimants do not have the expressed support of all, or substantially all, of the minority shareholders. I know that 34 out of a total of 172 shareholders have provided witness statements. I am told that they represent 9.3% of the shareholders by value. I accept that this is a significant proportion of the minority shareholding. It appears that not all of the shareholders were approached, apparently because the claimants do not have contact details for all shareholders. I have been told that there were no adverse responses. However, I do not know what information they have been provided with and nor do I know whether their motives in supporting the claim are entirely disinterested or are identical to the claimants. Moreover, I do not regard this as being a case where the views of independent minority shareholders necessarily carries great weight in assisting the court to see whether the best interests of the Company are served by allowing the claim to proceed or by refusing permission. In this case it does not in my judgment countervail against the preponderance of the factors pointing firmly in my view in the opposite direction.

100. In summary, therefore, I am satisfied that a mandatory ground for refusing to grant permission is made out and I am also satisfied that even if that was not so I would not have exercised my discretion to permit the claim to be brought for substantially the same reasons, albeit taking a wider range of considerations into account.

E. Conclusions

101. Permission must therefore be refused.

102. In the circumstances I need not say anything about the question of an indemnity against costs, but for completeness and in case the matter proceeds further it may assist if I state briefly what I would have done had I concluded that the IP claim should be permitted to be brought.

103. As regards an indemnity against costs, as is well known the court has a discretion as to whether or not to order that the claimants ought to be indemnified by the company in respect of their costs and, if so, whether that should be a complete indemnity or limited either in amount or to a particular stage in the litigation, but that the default position is that if a court has determined that the case is appropriate to be brought for the benefit of the company then the claimants ought to be indemnified.

104. As Mr Harper submitted, making an order that there should be an indemnity does not mean that the claimants will necessarily be repaid all of their costs, since that would depend on whether or not the Company is in a position to repay costs as and when the claimants are entitled to call for an indemnity (and the court also has a discretion as to whether or not the claimants should be entitled to obtain payments on account of their costs).

105. Whilst I would have concluded that it would have been appropriate to order an indemnity it would not have been in unqualified terms. In particular, given the claimants' previous over-enthusiastic pursuit of claims and my view that the Company ought not at this stage be ordered to, and would indeed be unable to meet, the costs already incurred or to have to make interim payments of costs going forwards: (a) the indemnity would only have extended to such costs as were agreed or allowed by the court on detailed assessment, with there to be costs budgeting at which the claimants' estimated costs should be the subject of careful scrutiny; (b) the indemnity would not have extended to costs incurred thus far, save insofar as the trial judge determined at the conclusion of the case that it should; (c) there would be no right to obtain any interim payment from the Company on account of such costs.

106. Since the existing Particulars of Claim is not in my view a suitable vehicle for the pursuit of the IP claim by itself or to enable the defendants to know the full case made against them, it would have been necessary for the claimants to file and serve a substituted Particulars of Claim, making it clear whether or not a claim under s.37 Patents Act 1977 is being made and, if so on, what basis and, in particular, setting out the claimants' case as regards limitation rather than leaving it to a Reply.

107. I would also have considered it desirable that the parties should at the earliest opportunity have and take the opportunity to engage in mediation or other ADR. If both parties are genuine in their expressed desire for the venture in which the Company is engaged to succeed, both for financial reasons and to benefit humanity in the development of useful diagnostic tools and treatments for diabetes and other conditions, then they ought to be able to reach an amicable settlement rather than risk the failure of their joint venture.

108. Finally, if the claimants were to make a claim under s.37 Patents Act 1977 then it would appear that the case would have to be transferred to the Intellectual Property List, either to the Patents Court or to the Intellectual Property Enterprise Court, subject to the approval of the appropriate judge. That would also involve consideration as to whether or not the case should remain in and be tried in Manchester, if a suitable judge could be made available, or be transferred to the Rolls Building, which is where it appears to me at least it more naturally belongs given the location of the parties.