**JUDGMENT : The Vice-Chancellor :** Chancery Division. 1st October 2002.

**Introduction**

1. In these proceedings, for which I gave leave pursuant to s.11(3)(d) Insolvency Act 1986 at the commencement of the hearing, the claimant Mr Kirit Thakrar (to whom I shall refer as "Kirit" so as to distinguish him from his two brothers and his nephew) seeks a declaration that the defendant Ciro Citterio Menswear plc ("the Company") is bound by the terms of a settlement agreement. The agreement in question is contained in a draft Tomlin order signed by the solicitors for Kirit and the Company on 9th August 2002. Most but not all the proceedings and claims to which it was intended to apply were due to be considered by the Court of Appeal on 13th August 2002 in relation to a number of applications for permission to appeal or to amend the appellants' notices in relation to appeals for which permission had already been granted.

2. On 13th August 2002 Kirit and the Company appeared before the Court of Appeal (Chadwick and Robert Walker LJJ) by counsel not previously concerned in the proceedings. The Company, supported by Kirit, applied for an order in the form of the agreed draft Tomlin order. This application was refused. The Court of Appeal then proceeded to hear and determine the various applications for permission to which I have referred substantially in the Company's favour. In subsequent correspondence the solicitors for the Company stated that their client "has no outstanding obligation to your client in relation to the proposed settlement".

3. These proceedings were commenced by a Part 8 claim issued on 6th September 2002. They have been brought on for hearing as a matter of urgency so that a decision may be made before the various appeals for which the Court of Appeal gave permission on 13th August 2002 come on for hearing in October 2002. Thus the issues before me include the questions (1) whether the draft Tomlin order contains an enforceable agreement for the settlement of the claims to which it refers not conditional on the making of the order it envisaged, and (2) what, if any, relief may properly be granted by a judge of first instance in the light of the refusal of the Court of Appeal to make the Tomlin order sought and the existence of the pending appeals. To deal with those and other incidental issues it is necessary to examine the factual background in some detail.

**The Facts**

4. The Company is a public company with an issued share capital of 300,000 preference shares and 106,750 ordinary shares of £1 each. All the preference shares are held by the trustees of the Company's pension fund. The ordinary shares are held by Kirit and his two brothers Rasik and Vinod and his nephew Nilesh in the proportions 21.78%, 42.6%, 26.9% and 8.62%. The four ordinary shareholders and two others who were neither shareholders nor members of the Thakrar family were the directors of the Company. The Company carried on business as a retailer of menswear. In the 1990s it expanded with the acquisition of Horne Bros, Oakland Menswear and Dunn & Co. By 1998 it owned or traded from 170 shops with an annual turnover of £80m.

5. An unfortunate family dispute led to a letter dated 8th February 1999 whereby the Company dismissed Kirit from all his offices. On 10th June 1999 Kirit presented a petition under s.459 Companies Act 1985. The respondents were Rasik, Vinod, Nilesh and the Company. He sought an order requiring the respondents to buy his shares at a price to be determined by the Court. It was common ground between Kirit and the individual respondents that the Company would play no active part in the proceedings. On 10th December 1999 Kirit and his wife commenced proceedings for unfair dismissal.

6. The s.459 proceedings came before HH Judge Boggis QC, sitting as an additional judge of the Chancery Division on 20th January 2000. With the consent of all parties he adjourned the proceedings to 27th July 2000 and directed that there should be a case management conference beforehand. The purpose of the adjournment was to enable the parties to implement the terms set out in the schedule to the order to which Kirit and the individual respondents had agreed. Those terms provided for a valuation of Kirit's shares in the Company by an expert appointed by both Kirit and the respondents and for those experts to negotiate in good faith to arrive at an agreed valuation by 30th April 2000. *"The respondents"* were obliged to buy Kirit's shares at such a valuation.

7. For reasons which are immaterial the machinery for the ascertainment of the price to be paid did not work. Accordingly when the petition came before Judge Boggis again on 27th July 2000 some further order was required. In the event Judge Boggis, having heard leading and junior counsel for both Kirit and the respondents, made an order by consent that the contract constituted by the schedule to the order of 20th January 2000 be specifically performed and carried into execution in accordance with the terms of that schedule but at a price to be determined by the Court. He gave directions for disclosure, inspection, exchange of witness statements and experts' reports. He fixed an eight day hearing to commence on 11th September 2000, with a pre-trial review on 5th September 2000.

8. At the pre-trial review on 5th September 2000 Judge Boggis made an order for an interim payment by the Company to Kirit of £500,000 on the undertaking of Kirit to transfer 5% of his shareholding to the Company. The hearing for which the judge provided in his order of 27th July 2000 duly commenced on 11th September. Judge Boggis gave his reserved judgment thereon on 17th October 2000. He determined that the price to be paid for the shares of Kirit was £6,140,000 with interest at the rates and for the periods set out in his order. He directed that the petition be re-listed for a further hearing on 13th November 2000 to consider the terms for payment pursuant to paragraph 7 of the terms scheduled to the order of 20th January 2000. In addition he made orders for interim payments on account of interest and costs.

9. On 6th November 2000 solicitors for all four respondents applied for an amendment of the order of 17th October 2000 to make clear that the respondents against whom the orders had been made included the Company. The application was heard by Judge Boggis on 13th November 2000 and was granted. The order of 17th October was reissued on 13th November 2000 in the form sought by the respondents declaring that the price and interest to be paid to Kirit was payable by all the respondents.

10. On 7th December 2000 Kirit applied for a declaration that the Company was bound by the orders of 20th January and 27th July 2000 either because of the provisions of s.143(3)(c) Companies Act 1985 or because the participation of all the shareholders of the Company constituted a resolution of the members for the purposes of ss.155(4) and 164 Companies Act 1985. In the alternative he sought an order that the respondents take all necessary steps to secure the passing of such a resolution. The evident object of this application was to ensure that any impediment to completion of the sale of Kirit's shares contained in ss.143 or 151 Companies Act 1985 was removed or satisfied.

*11.* This application was granted by Judge Boggis on 13th December 2000. He declared that the obligation of the Company, jointly and severally with the individual respondents, to buy Kirit's shares *"is by virtue of the provisions of s.143(3)(c) of the Companies Act 1985 and alternatively by virtue of the unanimous participation therein by 100% of the shareholders...binding on [the Company]"*

12. On 22nd December 2000, 7th, 14th and 26th February 2001 Judge Boggis made a series of further orders by way of the enforcement of his earlier orders the effect of which was to make charging orders absolute in favour of Kirit over 33 properties owned by the Company, including 39 Farquhar Road, Edgbaston standing in the name of Nilesh.

13. On 12th March 2001 Hart J made an administration order on the application of the directors of the Company. The witness statement in support of the application indicated a deficiency with regard to unsecured creditors of £25m. The purposes for which the order was made were a scheme of arrangement and the more advantageous realisation of the assets of the Company. The administrators are the second and third defendants to these proceedings. They are insolvency practitioners with Kroll Buchler Phillips.

14. On 28th September 2001 the administrators commenced proceedings for the recovery of 39 Farquhar Road, Edgbaston from Nilesh. On 20th December 2001 the administrators applied to the court for directions under s.14 Insolvency Act 1986. Mr Peter Leaver QC, sitting as a deputy judge of the Chancery Division, directed them to seek leave to amend the notices of appeal already served with permission against the orders of 6th September and 17th October 2000 so as to widen the scope of the

appeals and to seek permission to appeal out of time against the orders of 20th January, 27th July, 13th December and 22nd December 2000 and 7th, 14th and 28th February 2001.

15. An appellant's notice accompanied by a 22 page skeleton argument of counsel was duly served on 6th February 2002. It was this application which came before the Court of Appeal on 13th August 2002. In the meantime a number of events occurred to which I should briefly refer. On 27th February 2002 Anthony Mann QC, sitting as a deputy judge of the Chancery Division dismissed the Company's claim to 39 Farquhar Road. In doing so he awarded Kirit his costs of that action. The judge granted the Company permission to appeal and the relevant appellant's notice has been served. On 8th May 2002 Pumfrey J determined a number of applications concerning the application of ss.19(4) Insolvency Act 1986 to payments ordered to be made by the Company to Kirit in view of the fact that Kirit enjoyed security over the assets from which they would be made. Pumfrey J granted permission to appeal against one of his orders and such appeal is pending.

16. In June 2002 there were telephone conversations and correspondence between the solicitors for Kirit and the Company regarding the possibility of a settlement of all issues between them. This was in the context that there had been a settlement of the issues between Kirit and the individual respondents or their trustees in bankruptcy and appropriate requests by them for the withdrawal of their appeals or applications had been lodged. By the end of July 2002 it had been agreed that Kirit and the Company should seek the assistance of a mediator. On 2nd August 2002 Kirit and the Company signed a CEDR Solve Mediation Agreement and Mr Shapiro, a consultant with S.J.Berwin, was appointed the mediator. It was agreed that any agreement resulting from such mediation would be conditional on (a) its being recorded in writing and signed by the parties and (b) approved by a majority of the creditors' committee of the Company. The first condition is contained in paragraph 13 of the CEDR Solve Mediation Agreement, the latter was orally agreed by the solicitors for the parties.

17. On 6th August 2002 counsel for the Company applied to the Court of Appeal for an adjournment of the hearing of the applications for permission to amend or for leave to appeal out of time directed by Mr Leaver in December 2001. Notice that the hearing had been fixed for 13th August 2002 was given on 18th July but an application in writing for an adjournment had been refused on 31st July 2002. The ground of the application was that all counsel familiar with the case would be on holiday on 13th August. The oral application was refused.

18. The mediation took place on 8th and 9th August 2002 and was successful. The solicitor for the Company completed a draft order in Tomlin form, which he had prepared in advance of the mediation, with the terms of the settlement arising from the mediation. The order recited the attendances of counsel for Kirit and for the Company and the Administrators in which they were respectively defined as the Respondent, the Company and the Administrators, and the reading of documents as recorded on the court file and continued

*"AND the Company the Administrators and the Respondent (together the "Parties") having agreed to the terms set forth in the Schedule hereto.*

*IT IS ORDERED;*

*1. That the appeals are dismissed as between Rasik Vinod Nilesh and the Respondent*

*2. That all further proceedings in these appeals save for appeal number 2002 0482 to the extent it comprises claims between the Company and the Administrators and Surbhi Thakrar be stayed except for the purpose of carrying the said terms into effect.*

*3. That each Party bear its own costs.*

*AND for that purpose the Parties are to be at liberty to apply.*

*AND IT IS RECORDED that this order does not compromise all and any claims of the Respondent and/or the Company against Rasik Vinod and Nilesh as a result of the extant orders obtained by the Respondent at first instance in Birmingham District Registry proceedings CH 1999 10561."*

19. The schedule, headed as such on a different page, is in the following terms:

*"1. This agreement is in full and final settlement of all known claims and counterclaims between the Respondent and the Company or the Administrators whether pleaded in these Proceedings (as defined below) or not but specifically excluding any claim whatsoever concerning The Leon Allen Mans Shop Plc 1984 SSAS Pension*

*Fund including but not limited to claims concerning its assets former assets and payments that it has received or made.*

2. *It is agreed that the Company owes and will pay the Respondent an outstanding figure of £1,200,000 (ONE MILLION TWO HUNDRED THOUSAND POUNDS) ("Sum") pursuant to the orders and secured by the charging orders of His Honour Judge Boggis referred to in the Appeals and the first instance proceedings ("Proceedings") herein. It is acknowledged that £418,703.66 of the Sum is immediately discharged by operation of this order and Clause 5 of this Schedule and that the sum does not accrue interest.*
3. *For the avoidance of doubt all outstanding costs orders between the Company the Administrators and the Respondents including those in the Proceedings as well as those ordered to be paid to the Respondent by order of Mr. Justice Hart dated 14 March 2001 in the Chancery Division Companies Court proceedings No. 1717 of 2001 and His Honour Judge Boggis QC on 6 April 2001 in the Birmingham District Registry or ordered to be paid to the Administrators by the Respondent in Birmingham District Registry claim number 865 of 2001 shall be discharged to the extent that payment has not already been made.*
4. *The Respondent will sign and obtain from his wife Krishna Thakrar a consent order in terms agreed with the administrators whereby the claims of himself and his wife Krishna Thakrar as employees of the Company in Birmingham Employment Tribunal cases 5206425 and 5206426 of 1999 are discontinued with no order as to coasts.*
5. *The terms and obligations of the Respondent's solicitors Wragge & Co to DLA in the Chancery Division Companies Court proceedings 5784 of 2001 and Appeal 2002 0482 being for the avoidance of doubt set out in their documents and letters to the Administrators' solicitors dated 14 November 2001, 25 and 28 March 2002 are hereby entirely satisfied and unconditionally released."*

20. At the foot of the page containing the Schedule appear the signatures of the Solicitors for Kirit and for the Company and the Administrators and of the mediator. Both the cover and the backsheet to the draft order give the appropriate reference numbers for all the applications and appeals to which I have referred. On the backsheet the draft order is described as a consent order. The terms of the compromise were approved by each of the five members of the Creditors Committee constituted in accordance with Insolvency Rule 2.32 on or before 12th August 2002.

21. In preparation for the hearing before Chadwick and Robert Walker LJJ on 13th August 2002 the solicitors for the Company and the Administrators had supplied three bundles A, B and C containing relevant documents and the written arguments of counsel for the Company and the Administrators. The solicitors for Kirit had also supplied a substantial written argument prepared by counsel for Kirit and a witness statement by Kirit exhibiting material documents additional to those contained in Bundles A,B or C. It emerged at the hearing that those supplied by the solicitors for the Company and the administrators had reached and been considered by the members of the court but those provided by the solicitors for Kirit had not. At no stage was the court provided with any details of the mediation, let alone the note of the proceedings in evidence before me.

22. The hearing on 13th August 2002 was attended by counsel for the parties who had not been previously engaged. Counsel for the Company applied for an order in the form of the draft Tomlin order which, though copies had been supplied earlier, had only reached the members of the court shortly before they sat. The application was supported by counsel for Kirit. The transcript reveals that Chadwick LJ explored with counsel for the Company and the Administrators the implications of the compromise on the creditors and members of the Company. The court indicated that it was not minded to make an order in the agreed form and would deal with the applications for permission to amend and to appeal out of time listed for hearing before them.

23. In a judgment given by Chadwick LJ with which Robert Walker LJ agreed he dealt with each of the applications before the court. I can summarise the effect as follows:

*a) the applications of the administrators for permission to appeal from the orders of 20th January and 27th July 2000 should be refused because, as neither order bound the Company, there was no order to appeal against;*

*b) the application of the administrators to appeal generally from the orders of 5th September 2000 and 13th November 2000, limited permission having already been granted, should be granted by allowing amendments to the existing appellants' notices;*

*c) the application of the administrators for permission to appeal from the orders of 13th December 2000 and the four orders made between 22nd December 2000 and 28th February 2001 should be granted; and*

*e) Kirit should have permission to appeal from a second order of Pumfrey J made on 8th May 2002.*

24. With regard to the refusal to make the consent order sought Chadwick LJ recorded that:

*"50. We declined to make an order staying proceedings in order to effect a compromise in those terms. It seemed to us, for the reasons I have set out, very unlikely that a court if asked to address the question whether directions should be given to the administrators to pay to Kirit £800,000 ahead of the unsecured creditors, would think that an appropriate order to make. That is not, of course, to prejudge any order that a court dealing with such an application would make, on the material then available to him. But it is to indicate that, on the material before us, there appears to be a high risk that no court would give directions approving an agreement of compromise in the terms of the schedule. If those terms would not be approved by a Court - either on the administrators themselves seeking directions under section 14(3), of the Insolvency Act 1986, or on a challenge under section 27 of that Act, by an aggrieved unsecured creditor - then to make an order staying all proceedings in order that those terms should be carried into effect would simply be to postpone the decisions that we would otherwise make on the application for permission to appeal listed for hearing this morning.*

*51. It may be that, notwithstanding our judgments today, the creditors will still take the view that it is expedient to compromise this litigation by paying Kirit £800,000 in addition to the £400,000 which he is to receive from the Farquhar Road property; in which case it can be explained to a judge in the administration proceedings why that is a view which he should endorse. If that view is taken and endorsed then, of course, nothing that we may say this morning will prevent such a compromise tasking effect. But, we have been concerned that our apparent approval to a compromise in the terms proposed might be misconstrued as approval of the payment of £800,000 to Kirit, ahead of the unsecured creditors. He took the view that a court which had to consider the matter in the administration proceedings ought to have the benefit of our views as to the true position."*

Robert Walker LJ expressed his full agreement with the orders and directions proposed by Chadwick LJ.

25. The administrators have not sought the directions of the court under s.14(3) Insolvency Act 1986 or otherwise. Nor has any creditor applied to the Court under s.27 Insolvency Act 1986 or otherwise indicated concern at the terms of the settlement apparently achieved in the mediation. Indeed those terms were approved by all five members of the Creditors Committee. They represented creditors with debts of £10.86m or 44% of the total due to unsecured creditors excluding Kirit. The attitude of the Administrators and the Company, as I have already recorded, is that the obligations to which they were formerly subject ceased with the refusal of the Court of Appeal to make the agreed Tomlin order. They are not prepared to agree again to the same terms as before because, of course, the judgment of the Court of Appeal on the applications heard on 13th August 2002 has substantially altered the negotiating strengths of the parties.

26. Kirit has not applied to the Court of Appeal for a rehearing on the grounds that his written argument and evidence had not been considered by the court on 13th August 2002 or that he ought to have had an opportunity to adduce evidence of the course of the mediation. As his counsel explained there is no point because the Company is no longer prepared to consent to the Tomlin order and though, as counsel for the Company admits, such argument and evidence is relevant to the matters which concerned Chadwick LJ they would not justify an application to set aside the permission to amend and to appeal out of time which the court had granted.

27. It is in these most unusual circumstances that Kirit seeks a declaration that the Company is bound by the terms of the settlement reached in the mediation. Before turning to the issues I have to decide it is convenient to mention those which I do not. First, it is common ground that I am entitled to conclude that the Company is so bound because it is clear from the paragraphs in the judgment of Chadwick LJ which I have quoted in paragraph 24 above that the Court of Appeal did not conclude that there was no immediately enforceable contract. Second, it is also common ground that by virtue of s.14(1) and Schedule 1 para.18 Insolvency Act 1986 the administrators had the power to enter into the alleged compromise without the approval of the court or the creditors' committee and notwithstanding the

possibility of a subsequent challenge under s.27 Insolvency Act 1986. They might, but were not bound to, seek the directions of the court under s.14(3) Insolvency Act 1986. The creditors' committee exists to assist the administrators, Insolvency Rules 2.34(1), and did in fact approve of the terms. Third, it is not suggested that the mediation was anything other than bona fide or that the resulting agreement was anything other than a genuine commercial transaction.

28. Counsel for the Company contends that I should not conclude that the Company is bound by the terms contained in the schedule to the draft Tomlin order because (a) there was a single agreement conditional on the making of the Tomlin order, and (b) the agreement if not conditional is unenforceable for illegality. I will deal with those issues in turn.

**Conditionality**

29. I have described or quoted the relevant parts of the draft Tomlin order in paragraphs 18 and 19 above. It is common ground that an agreement to settle contained in a draft Tomlin order is not of its nature conditional on the making of the order; it may or may not be depending on its true construction.

30. Counsel for the Company submits that in view of its genesis and terms this agreement to settle was conditional on the making of the order. He relies on the fact that the terms of settlement had no prior existence in the sense that they were always recorded in, and only in, the draft Tomlin order. He contends that on the true construction of the draft order as a whole it constituted a single indivisible agreement of which there could not be complete performance unless and until the Tomlin order was made. He argued that the part of the order which recorded that it did not compromise claims against Rasik, Vinod and Nilesh itself recognised that it was the order which effected the compromise. He referred me to the unreported decision of the Court of Appeal in **Hollingsworth v Humphrey** (10th December 1987) as an example of a case in which the stay of the proceedings was an integral part of the compromise and to the advice of the Privy Council in **Horizon Technologies Ltd v Lucky Wealth Consultants Ltd** [1982] 1 WLR 24 where, as there was a prior written agreement, it was not.

31. This is disputed by counsel for Kirit. He accepts that there was no prior agreement in the sense of a written agreement containing the terms of the schedule alone. He points out that the order did much more than stay the proceedings between Kirit and the Company. He relies on paragraph 1 of the order which was required because of a different arrangement regarding the appeals between Rasik, Vinod and Nilesh on the one hand and Kirit on the other. He points out that the saving provision in paragraph 2 of the order was a clarification of the scope of the mediation agreement. He contends that the schedule can and was intended to operate as a free-standing agreement. He suggests that the reference to the order in paragraph 2 is merely a mistake as to the operation of the agreement.

32. I prefer the submissions for Kirit. Existing proceedings may be settled in a number of ways as described by Slade J in **Green v Rosen** [1955] 1 WLR 741. Likewise differences may be compromised without the need for any proceedings at all. The purpose of a Tomlin order is to enable the enforcement of the terms of settlement of an existing action by summary process in that action. The alternative in most cases is to commence separate proceedings for the specific performance of the contract of settlement. Thus, as is common ground, the contract of settlement is capable of being distinct from the Tomlin order or any agreement to procure it. An example of such distinct contracts is afforded by **Horizon Technologies Ltd v Lucky Wealth Consultants Ltd** [1982] 1 WLR 24. Plainly the parties can achieve that result without going through the laborious process of first making a contract and then scheduling it to the Tomlin order. In my view that is what the parties did in this case.

33. First, the compromise included issues arising outside the litigation pending before the Court of Appeal. This is apparent from the terms of paragraph 1 of the Schedule and the specific example of Kirit's claim for unfair dismissal. This and the comparable claim of Kirit's wife were dealt with in paragraph 4 of the Schedule. There is no reason why the parties should wish the settlement of those claims to be conditional on a stay of the proceedings to which the draft order applied.

34. Second, the terms negotiated in the mediation and set out in the Schedule to the draft Tomlin order were expressly subject to two conditions, namely that contained in paragraph 13 of the CEDR Solve Mediation Agreement requiring those terms to be reduced to writing and signed by or on behalf of the

parties and that which was orally agreed requiring the approval of a majority of the creditors' committee. Both those conditions were satisfied. In those circumstances effect should be given to the terms contained in the schedule unless the intention to subject them to a third condition is clearly established.

35. Third, the terms of the Schedule are in themselves complete except for the reference to the order in paragraph 2. But I can see nothing in the order to effect the discharge to which that paragraph refers and I do not accept that this confused reference reveals any intention at all, let alone one of sufficient clarity as to justify the imposition of a third condition.

36. Fourth, the recital to the order set out in paragraph 18 above "the parties having agreed the terms set out in the Schedule hereto" indicates an intention that the parties are to be treated as having already made a contract in those terms even though in this case there was no earlier agreement in fact. It is true that the recital is in the standard form of Tomlin order and that a compromise scheduled to such an order may be conditional on the order being made. Nevertheless given the terms of this schedule I regard the recital as express confirmation of an intention in this case that the compromise should be regarded as both prior to and independent of the making of the order.

37. Fifth, in the same way that the Schedule is in terms independent of the order the order is required for purposes additional to providing for the enforcement of the terms in the schedule. Thus paragraph 1 is extraneous to the compromise. The exception in paragraph 2 and the final "recording" are needed to limit the effect of the order not the schedule.

38. For all these reasons I conclude that the agreement contained in the schedule to the draft Tomlin order was not conditional on the making of that order.

**Enforceability**

39. The propositions on which the Company relies as set out in its written argument are that where (1) proceedings concern an illegal agreement or transaction which is alleged to be unlawful; (2) the court concludes that the transaction was or was highly likely to have been illegal; and (3) the parties nevertheless compromise their dispute concerning that agreement or transaction, the court will not enforce the compromise any more than it would the underlying illegal transaction. For those propositions it relies on Chitty on Contracts 28th Edition Vol 1 pp 843-844 and Foskett, the Law and Practice of Compromise 5th Edition pp 71-72.

40. Counsel for Kirit submits that such principles cannot apply in that the orders of HH Judge Boggis QC from which the obligation of the Company to Kirit stems may be wrong in law but cannot be stigmatised as illegal so as to come within the principle on which the Company relies. In any event, he submits, the decision of the Court of Appeal in **Binder v Alachouzos** [1972] 2 QB 151 establishes that the court will enforce a bona fide compromise of a dispute whether or not the underlying agreement was illegal, at least if it includes an issue of fact.

41. Plainly it is necessary to analyse what is alleged to be the illegality. The provisions relied on are s.143(1) and s.151(1) Companies Act 1985. In each case a contravention of the statutory prohibition is punishable by the imposition of a fine, but in each case the prohibition is subject to exceptions. I will consider them in turn.

42. S.143(1) provides that subject to the following provisions a company such as the Company "shall not acquire its own shares, whether by purchase, subscription or otherwise". But subsection (3)(a) and (c) provide that subsection (1) does not apply to, amongst other things, (a) a purchase of shares in accordance with Chapter VII or (c) to a purchase pursuant to an order of the court made in proceedings under s.459 Companies Act 1985.

43. In summary Chapter VII permits a company to purchase its own shares otherwise than on a recognised stock exchange if it is carried out under a contract approved in advance by a special resolution of the members of the Company and is made out of distributable profits. Distributable profits are defined by ss.181, 263(1) and (3) and 270(3) as being those net realised profits as are shown in the last annual accounts.

44. S.151(1) prohibits a company from giving financial assistance directly or indirectly for the purpose of the acquisition by any person of its shares. But that prohibition does not apply to a purchase of shares made in accordance with Chapter VII, the conditions for which I have summarised in the preceding paragraph.

45. As a Chapter VII purchase falls outside the prohibitions of both ss. 143(1) and 151(1) it is convenient to consider this issue by reference to that exception. The issues were (1) whether there were distributable profits from which to make the purchase or provide the assistance and (2) whether the participation of all the members was to be treated as the equivalent of a special resolution. If the answer to both is in the affirmative there could be no illegality.

46. The second issue had been decided by HH Judge Boggis in the affirmative by his order dated 13th December 2000. His decision in that regard has been criticised by Chadwick LJ in paragraph 40 of his judgment granting permission to appeal from it. But as at 9th August 2002, when the compromise agreement was concluded, there was no appeal against that order and time for that purpose had long since expired. I do not see how at that date the order of Judge Boggis or its effect can be described as or giving rise to an illegal transaction for the purposes of the principles the Company seeks to apply. It was an order of a deputy judge of the High Court which is valid and effective unless and until set aside. As at 9th August 2002 such order could not be set aside unless and until the Company obtained permission to appeal out of time and succeeded on its consequential appeal.

47. With regard to the first issue there does not seem to be any specific order of Judge Boggis on the point. But in November/December 2000 the financial position of the Company was by no means clear. I understood at the hearing that it was common ground that the last annual accounts of the Company referred to in s.270(3) Companies Act 1985, albeit out of date, showed sufficient distributable profits to cover the liability to purchase the shares in the Company. The current financial position was by no means clear. Evidence in the mediation indicated that, in addition to the letter of 7th December 2000 referred to by Chadwick LJ in paragraph 36 of his judgment, there was a letter from the Company's former solicitors to Kirit's solicitors dated 24th November 2000 stating that the Company had distributable profits of £10.6m and management accounts indicating net distributable profits of £10m as at the end December 2000. In the course of the mediation PriceWaterhouseCoopers gave expert evidence to the effect that in their opinion based on all the evidence by then available to them the net distributable profits of the Company as at December 2000 were not less than the sum of £6.14m which had been determined by Judge Boggis on 17th October 2000 to be the price payable for Kirit's shares.

48. In **Binder v Alachouzos** [1972] 2 QB 151 Binder sought to recover from Alachouzos £65,000 as money lent. The defence was that Binder was an unregistered moneylender so that the obligation to repay was illegal and void. The action was compromised just before the trial on terms that Alachouzos would pay a specified sum to Binder with interest and by instalments. Alachouzos defaulted and Binder sued to recover the sums due under the compromise agreement. Alachouzos again relied on the Moneylenders Act. Binder's application for summary judgment was granted by the Master. The subsequent appeals of Alachouzos to both Geoffrey Lane J and the Court of Appeal were dismissed.

*49.* The argument for Binder was to the effect that as the issue was one of illegality the parties could not avoid the consequences by compromising the issue. This was rejected by all three members of the court. The issue was dealt with by Lord Denning MR at page 157 in the following terms: *"There are here two competing considerations. On the one hand the Moneylenders Acts are for the protection of borrowers. The judges will, therefore, not allow a moneylender to use a compromise as a means of getting round the Act. They will inquire into the circumstances giving rise to the compromise. They will not allow the moneylender to take unfair advantage of the borrower. Even if the borrower consents to judgment being entered against him, the courts will go behind that consent, if the justice of the case so requires. For instance, where the interest charged was so high that it was presumed to be harsh and unconscionable, the court refused to enforce a consent to judgment: see* ***Mills Conduit Investment Ltd. v Leslie*** *[1932] 1 K.B. 233.*

*On the other hand, it is important that the courts should enforce compromises which are agreed in good faith between the lender and the borrower. If the court is satisfied that the terms are fair and reasonable, then the compromise should be held binding. For instance, if there is a genuine difference as to whether the lender is a*

*moneylender or not, then it is open to the parties to enter into a bona fide agreement of compromise. Otherwise, there could never be a compromise of such an action. Every case would have to go to the court for final determination and decision. That cannot be right."*

Later he added: *"In my judgment, a bona fide agreement of compromise such as we have in the present case (where the dispute is as to whether the plaintiff is a moneylender or not) is binding. It cannot be reopened unless there is evidence that the lender has taken undue advantage of the situation of the borrower. In this case no undue advantage was taken. Both sides were advised by competent lawyers on each side. There was fair arguable case for each. The agreement they reached was fair and reasonable. It should not be reopened."*

*50.* The judgment of Phillimore LJ was to the like effect. At page 159 he said: *"Speaking for myself, I think it is entirely plain that this was a bona fide compromise, and that there is nothing in the evidence here which could make this court say with any confidence that these were moneylending transactions, illegal transactions; and accordingly, as it seems to me, here the court is faced with a bona fide compromise of what was a question of fact. The terms of the agreement are not to be described as colourable. The court ought to be very slow to look behind an agreement reached in such circumstances as these. I cannot think that Mr. Jackson has made out anything like a case which would be strong enough to justify this court in looking behind the terms of what was clearly a bona fide compromise, and I would accordingly dismiss this appeal."*

Phillimore LJ referred in terms to the compromise being on a question of fact. To this extent the principle he applied was narrower than that expressed by Lord Denning MR.

*51.* At page 160 Roskill LJ stated: *"In my judgment it is the law of this country, as Lord Denning M.R. has said, where there is a bona fide compromise of an existing dispute and that compromise includes a compromise of what, as Mr. Joseph said, is basically an issue of fact, namely, whether or not there has in fact been unlawful moneylending, especially where the compromise has been reached under the advice of Counsel and solicitors, that that compromise is enforceable against the party seeking subsequently to repudiate it. Any other course would cause very great difficulty in the administration of justice. One example will suffice: subject to the sanction of the Court, a liquidator is entitled to compromise a dispute with debtors or supposed debtors of the company of which he is a liquidator. What is he to do if he is met by the defence that the debt or supposed debt arose from unlawful moneylending? Must he refuse to compromise? What is the court to do? Must the court refuse to sanction a compromise because it can always be reopened later? Is the court to investigate the whole matter, or can it look at the matter broadly and see whether or not a bona fide compromise should be arrived at or has been arrived at? In such a case it seems to me clear that the court should encourage and when appropriate enforce any bona fide compromise arrived at, especially one arrived at under legal advice."*

He added, after reference to two other matters, *"But however that may be, this shows that there was a dispute on an issue of fact, and that issue of fact was the subject of a bona fide compromise. For my part I can see no reason whatever why those who enter into bona fide compromises of this kind should be allowed to escape, as the present defendant seeks to escape from the bonds of the agreement into which he freely entered under legal advice three days before the case came on for trial."*

Thus Roskill LJ also envisaged that the dispute being compromised must at least include an issue of fact. I do not understand him to have held that the issue must be confined to one of fact.

52. Counsel for the Company does not dispute the application of that principle where the question in dispute is a pure question of fact. He submits that the second issue to which I have referred in paragraph 45 above is one of law. With regard to the first I did not understand him to submit that the issue was purely one of law, rather that the conclusion expressed by Chadwick LJ based on the letter of 7th December 2000 was unassailable as a matter of fact on the basis, as set out in paragraph 6 of his supplemental written argument, that "there is no new material before the court". I do not accept that submission. The evidence in the mediation is new and relevant material.

53. I have no hesitation in concluding that the compromise arising from the mediation is one which the court can and should uphold. There can be no question but that the mediation was genuine and the resulting agreement arrived at on a proper commercial basis. Each side was represented by experienced solicitors and had the assistance of skilled accountants. On the basis of the evidence adduced in the mediation the extent of the Company's distributable profits as at December 2000 was

arguable. On one view they were sufficient to cover the amount of the liability for the shares as declared by Judge Boggis or the lesser amount arising from the compromise. Whilst the question whether the concurrence of all members of a company can satisfy the requirement of a special resolution imposed by s.164 Companies Act 1985 on the principle of **Re Duomatic Ltd** [1969] 2 Ch.365 may be a question of law it is but one only of the questions relevant to the basic issue of whether the purchase or financial assistance was lawful or not. I do not accept that it is permissible to subdivide the basic issue, isolate a pure point of law and then avoid the application of the principle of **Binder v Alachouzos** however bona fide the compromise may be.

54. That basic issue involving questions of fact and law only arose if permission to appeal from the order of 13th December 2000 was granted out of time. As at 9th August 2002 neither side could be certain of the outcome of the application for such an order. There could be nothing unlawful in an agreement compromising or resolving that doubt. In those circumstances I do not accept that the compromise of "*all known claims and counterclaims*", as provided for by the Schedule to the draft Tomlin order, can be avoided on the ground that the judge in making his order on 13th December 2000 may not have correctly applied Part VII Companies Act 1985.

55. For all these reasons I conclude that the compromise agreement is enforceable as well as unconditional. Accordingly I will make a declaration to that effect.

**Relief**

56. Kirit also seeks specific performance of the agreement. I was concerned at what further relief I could properly grant given the fact that the appeals are pending and likely to be heard shortly. However counsel for the Company helpfully accepted that if I reached the conclusion I have then, subject to any appeal against my order, he could not proceed with the pending appeals. He accepted that in that event I should direct the Administrators to discontinue the pending appeals to such extent as is necessary to give effect to the compromise. I will make such an order.

**Conclusion**

57. For all these reasons I will
    (a) declare that the agreement contained in the Schedule to the draft Tomlin order is both unconditional and enforceable;
    (b) direct the administrators to discontinue the appeals pending in the Court of Appeal to the extent necessary to give effect to those terms.

    I will hear further argument on the form of my order and any consequential matters.

Mr. John Randall QC and Mr. Lance Ashworth (instructed by Messrs. Wragge & Co) for the Claimant
Mr. David Richards QC and Mr. Philip Marshall (instructed by Messrs Dibb Lupton Alsop) for the Defendants