Neutral Citation Number: [2017] EWCA Civ 1201

Case No: A2/2016/3206

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
BIRMINGHAM DISTRICT REGISTRY
CASE No: 8446 OF 2013

Royal Courts of Justice
Rolls Building
London, EC4

Date: 01/08/2017

Before:

SIR GEOFFREY VOS, CHANCELLOR OF THE HIGH COURT
LORD JUSTICE UNDERHILL
and
LORD JUSTICE HENDERSON

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Between:

	GURSHARAN RANDHAWA **SUKHINDER RANDHAWA**	**Applicants/ Appellants**
	- and -	
	ANDREW TURPIN **MATTHEW HARDY** **(as former Joint Administrators of BW Estates Limited)**	**Respondents**

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Mr Richard Salter QC and Mr William Edwards (instructed by **Tenet Compliance & Litigation Ltd**) for the **Appellants**
Mr Peter Arden QC and Mr Matthew Weaver (instructed by **Cameron Legal Ltd**) for the **Respondents**

Hearing dates: 12th and 13th July 2017

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Approved Judgment

Sir Geoffrey Vos, Chancellor of the High Court:

Introduction

1. This appeal raises what appears to be a comparatively simple question, namely whether the sole director of a company, whose articles required two directors for its board meeting to be quorate, could validly appoint administrators under paragraph 22 of Schedule B1 to the Insolvency Act 1986 ("Schedule B1"). The complicating feature of the case was that, whilst 75% of the shares in the company were held by that sole director, the remaining 25% were at all times registered in the name of a long-dissolved Manx company.

2. The judge decided, putting the matter very broadly, that the administrators' appointment was valid on the basis that (a) the articles of association had been informally varied by the members' informal course of conduct, (b) the consent of the only existing registered shareholder (holding 75% of the company's shares) was sufficient to trigger the principle arising from Buckley J's decision in *Re Duomatic Ltd* [1969] 2 Ch 365 (the "*Duomatic* principle"), and the requirement in the articles of association for a quorum of two members for a shareholders' meeting could not prevent the operation of that principle, when no actual meeting had ever taken place, or (c) each of (i) the beneficial owner of 100% of the Company's shares (the father of the registered holder of the 75%), (ii) the existing registered shareholder, and (iii) the Company's solicitors had acquiesced in the appointment, and the appellants (who took an assignment of debt from those solicitors) were fixed with that acquiescence. In any event, the application by the appellants was a *Henderson v. Henderson* (1843) 3 Hare 100 abuse of process, because they had not challenged the validity of the appointment in a previous application.

3. The applicants before the judge and the appellants in this court are two creditors of the company, BW Estates Limited (the "Company"), Mr Gursharan Randhawa and Mr Sukhinder Randhawa (together the "Randhawas"). The respondents here and before the judge were the joint administrators, Mr Andrew Turpin ("Mr Turpin") and Mr Matthew Hardy (the "Joint Administrators").

4. Put very shortly, the Randhawas contend that the sole director was not entitled to make any valid appointment, when there was no second director to make up a valid quorum of two directors, and that the *Duomatic* principle cannot be extended so as to operate without the consent of the two registered shareholders required to make up a quorum of members at a shareholders' meeting. The Randhawas also contend that neither acquiescence nor abuse of process can be relied upon to prevent the court considering the binary question as to validity of the appointment of an administrator.

5. Many other issues were canvassed by the judge and in argument before us, but the case boiled down to these few points. I shall, however deal with the other issues raised in due course.

Chronological background

6. On 13th January 1986, the Company was incorporated. Mr Robert Williams ("Robert") subscribed for 75 shares and his wife, Mrs Pauline Williams ("Pauline"), for 25 shares. From the Company's incorporation until 2009, its directors were

Robert and Pauline. The Company owned five properties let and managed by agents and charged to Nationwide Building Society ("Nationwide").

7. According to the Company's Annual Returns, in 1988 or 1989 Pauline's 25% shareholding in the Company was transferred to Belvadere Investment Company Limited, a company incorporated in the Isle of Man ("Belvadere").

8. On 23rd October 1996, Belvadere was dissolved, so that any of its assets passed to the Crown as *bona vacantia* under what is now section 193 of the Isle of Man Companies Act 2006. Belvadere was, however, seemingly never removed from the register of members of the Company.

9. On 12th August 2009, David was appointed as a director of the Company. On 13th August 2009, Robert resigned as a director of the Company following an undertaking he gave to the court in directors' disqualification proceedings that he would not act as a director of any company. The position after 13th August 2009 was, therefore, that David (Robert's son) was the sole director of the Company. It was alleged, however, that David was, in relation to the Company's affairs, accustomed to act on the instructions of his father, despite Robert's disqualification.

10. On 8th November 2012, HHJ Simon Brown made an order in favour of the Randhawas entering judgment against Robert for damages to be assessed and an interim payment of £686,487 on account. He also ordered that Robert should state "who, to his knowledge, beneficially owns the shares in Belvedere Estates Limited (a company incorporated in the Isle of Man)".

11. On 15th November 2012, Robert responded to the 8th November 2012 order saying "I do not know. I was acquainted with a company Belvadere Investments Co Ltd but was told this was liquidated some time ago".

12. On 18th February 2013, final charging orders were made in favour of the Randhawas. The first was against Robert and Pauline over a number of properties, and the second was against Robert alone over shares including the 75 shares in the Company registered in David's name, but of which Robert was alleged to be the beneficial owner.

13. On 12th June 2013, HHJ Simon Brown gave final judgment in favour of the Randhawas against Robert for some £2,158,891.79 inclusive of interest, plus indemnity costs in respect of claims for fraudulent misrepresentation. The judge ordered that the file should be sent to the Director of Public Prosecutions to consider what action should be taken in respect of Robert.

14. On 12th July 2013, Nationwide appointed fixed charge receivers over all five properties owned by the Company.

15. On 19th July 2013, Mr Turpin's contemporaneous note of a meeting attended by him, Robert, David, and Mr Martin Lord ("Mr Lord"), a representative of Lewis Onions, the Company's solicitors, recorded that "it is considered appropriate to place the [Company] into administration, to take control of the [Company's] affairs and protect the interests of all creditors generally".

16. On 28th August 2013, a directors' meeting of the Company took place, attended by David as the sole director of the Company, Mr Lord, Mr Turpin and another representative of the Joint Administrators' then firm. The minutes record that "a quorum was present", and that "[h]aving regard to the financial position of the Company … it would be in the best interests of the Company if the directors sought the appointment of the [Joint Administrators] as joint administrators to the Company". The meeting also purported to appoint Lewis Onions to swear the necessary statutory declarations and notice of appointment.

17. On 29th August 2013, notice of the intended appointment of the Joint Administrators was sent to Nationwide. An issue developed as to whether the notice was properly sent and received, but that issue does not affect what this court has to decide.

18. On 11th September 2013, David, as the sole *de iure* director of the Company, purported to appoint the Joint Administrators as joint administrators of the Company under paragraph 22 of Schedule B1. Nationwide had neither made its own appointment nor objected to the appointment proposed by David. Both Joint Administrators filed statements dated 11th September 2013 consenting to act and expressing the opinion that the purposes of the administration were reasonably likely to be achieved.

19. On 17th September 2013, Robert issued a debtor's bankruptcy petition seeking a bankruptcy order, which was in due course duly made.

20. An estimated statement of affairs filed by the Joint Administrators dated 4th November 2013 showed assets of £621,682 and debts of £602,982, including a debt of £553,108 said to be owed to "Belvadere Investments" and recorded in the notes as having some uncertainty surrounding it.

21. On 21st May 2014, HHJ Cooke directed the Joint Administrators to convene a meeting of creditors and present revised proposals to bring the administration to an end.

22. On 24th July 2014, the Randhawas purchased (at face value) a debt of £17,790 payable by the Company to its solicitors, Lewis Onions.

23. On 13th August 2014, the Randhawas issued an application under Insolvency Rule 2.109 and paragraph 74 of Schedule B1 for orders that the Joint Administrators' remuneration be disallowed or reduced, and that the Joint Administrators pay the costs of the application personally. This application did not, however, contend that the appointment of the Joint Administrators was invalid. It rested on the basis that the Joint Administrators could not, in the circumstances, have made a proper statement that the purpose of administration was likely to be achieved, and that the actions taken by the Joint Administrators were ineffectual, such that they should not be given any remuneration at all.

24. On 22nd August 2014, the Joint Administrators ceased to hold office, and the Randhawas assumed control of the Company by the appointment of the first appellant, Mr Gursharan Randhawa, as sole director of the Company.

25. On 2nd March 2015, HH Judge David Cooke gave judgment (*Re BW Estates Ltd* [2015] EWHC 517 (Ch)) dismissing the Randhawas' application, but granting

permission to appeal. He held that the Randhawas had put forward no positive case for an order under paragraph 74 on the basis that the "administrator had acted so as unfairly to harm the interests of the applicant". He recognised that there was some force in the suggestion that the Joint Administrators should not have incurred significant costs in investigating Belvadere's claim once initial inquiries had shown that it was dissolved and Robert and David were not able or willing to provide any other firm information. He ordered an assessment of the Joint Administrators' remuneration.

26. HHJ Cooke said the following in his judgment:

> "9. The Randhawas do not now contend that the appointment of the [Joint] Administrators was invalid. It is accepted that the [Company] was "unable to pay its debts" at the date of the appointment, because Nationwide had in July 2013 properly demanded repayment of its lending on account of the payments missed.
>
> 10. The Randhawas' overall contention however is that there was no good reason for the [Company] to go into administration at all.
>
> 11. In the Randhawas' view the defaults to Nationwide and the administration appointment was made … in order to delay and frustrate their efforts to satisfy the judgment against [Robert]. …
>
> 13. … the probability must be that Belvadere is either entirely fictitious or some *alter ego* for [Robert]. …
>
> 27. It is not, I repeat, suggested that the administrators themselves acted from any improper purpose or by way of participation in or assisting any improper purpose the director may have had".

27. On 15th June 2015, the Randhawas entered into a share purchase agreement with Robert's trustees in bankruptcy, which transferred Robert's beneficial interest in David's 75 shares in the Company to the Randhawas.

28. On 1st December 2015, the Randhawas issued the application that is now the subject of this appeal, challenging the validity of the Joint Administrators' appointment. The Randhawas sought a declaration that the Joint Administrators had been invalidly appointed and orders that the Joint Administrators repay all remuneration and costs and release all charges they had over the Company's assets.

29. On 21st April 2016, HH Judge Purle QC heard the Randhawas' application. Due to time limitations, he dealt only with the alleged invalidity of the Joint Administrators' appointment and adjourned consideration of the other relief sought. He delivered his judgment dismissing the application on 22nd July 2016, and granted the Randhawas permission to appeal.

30. Finally, in October 2016, Patten LJ refused the Randhawas' application to have the two appeals consolidated, but ordered that the hearing of this appeal should precede that in respect of the order of HHJ Cooke.

Relevant statutory provisions

31. Schedule B1 to the Insolvency Act 1986 contains the following provisions:-

i) Paragraph 12(1) provides that "[a]n application to the court for an administration order in respect of a company … may be made only by – (a) the company, (b) the directors of the company, (c) one or more creditors of the company …".

ii) Paragraph 22(1) provides that "[a] company may appoint an administrator".

iii) Paragraph 22(2) provides that "[t]he directors of a company may appoint an administrator".

iv) Paragraph 104 provides that "[a]n act of the administrator of a company is valid in spite of a defect in his appointment or qualification".

v) Paragraph 105 provides that a "reference in this Schedule to something done by the directors of a company includes a reference to the same thing done by a majority of the directors of a company".

32. Rule 7.55 of the Insolvency Rules 1986 provides that "[n]o insolvency proceedings shall be invalidated by any formal defect or by any irregularity, unless the court before which objection is made considers that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the court".

33. Sections 39 and 40 of the Companies Act 2006 provide as follows:-

"**39 A company's capacity**

(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's constitution.

…

40 Power of directors to bind the company

(1) In favour of a person dealing with a company in good faith, the power of the directors to bind the company, or authorise others to do so, is deemed to be free of any limitation under the company's constitution.

(2) For this purpose—

(a) a person 'deals with' a company if he is party to any transaction or other act to which the company is a party,

(b) a person dealing with a company—

(i) is not bound to enquire as to any limitation on the powers of the directors to bind the company or authorise others to do so,

> (ii) is presumed to have acted in good faith unless the contrary is proved, and
>
> (iii) is not to be regarded as acting in bad faith by reason only of his knowing that an act is beyond the powers of the directors under the company's constitution. …

> (4) This section does not affect the right of any member of the company to bring proceedings to restrain the doing of an action that is beyond the powers of the directors.
>
> But no such proceedings lie in respect of an act to be done in fulfilment of a legal obligation arising from a previous act of the company.
>
> (5) This section does not affect any liability incurred by the directors, or any other person, by reason of the directors exceeding their powers".

The Articles of Association of the Company

34. The Company's Articles of Association (the "Articles") applied the regulations contained in Table A to the Companies Act 1985 ("Table A") (apart from regulations 8, 64, 76, 77 and 113) to the Company.

35. Paragraph 12 of the Company's Articles provided as follows:-

> "12. Unless and until otherwise determined by the Company in General Meeting, the number of the Directors shall not be less than two nor more than five. [The following shall be the first Directors of the Company, that is to say [Robert] and [Pauline]]."

36. Under the heading of "Proceedings at General Meetings", Table A provided:-

> "40. No business shall be transacted at any meeting unless a quorum is present. Two persons entitled to vote upon the business to be transacted, each being a member or a proxy for a member or a duly authorised representative of a corporation, shall be a quorum".

37. Under the heading of "Powers of Directors", Table A provided as follows:-

> "70. Subject to the provisions of the Act, the memorandum and the articles and to any directions given by special resolution, the business of the company shall be managed by the directors who may exercise all the powers of the company. No alteration of the memorandum or articles and no such direction shall invalidate any prior act of the directors which would have been valid if that alteration had not been made or if that direction had not been given. The powers given by this regulation shall not be limited by any special power given to the directors by the articles and a meeting of directors at which a quorum is present may exercise all powers exercisable by the directors."

38. Under the heading "Appointment and Retirement of Directors", Table A provided as follows:-

> "73. … at every subsequent annual general meeting one-third of the directors who are subject to retirement by rotation or, if their number is not three or a multiple of three, the number nearest to one-third shall retire from office but, if there is only one director who is subject to retirement by rotation, he shall retire.
>
> 74. Subject to the provisions of the Act, the directors to retire by rotation shall be those who have been longest in office since their last appointment or reappointment, but as between persons who became or were last reappointed directors on the same day those to retire shall (unless they otherwise agree among themselves) be determined by lot.
>
> 75. If the company, at the meeting at which a director retires by rotation, does not fill the vacancy the retiring director shall, if willing to act, be deemed to have been reappointed unless at the meeting it is resolved not to fill the vacancy or unless a resolution for the reappointment of the director is put to the meeting and lost.
>
> …
>
> 78. Subject as aforesaid, the company may by ordinary resolution appoint a person who is willing to act to be a director either to fill a vacancy or as an additional director and may also determine the rotation in which any additional directors are to retire.
>
> 79. The directors may appoint a person who is willing to act to be a director, either to fill a vacancy or as an additional director, provided that the appointment does not cause the number of directors to exceed any number fixed by or in accordance with the articles as the maximum number of directors. …
>
> 80. Subject as aforesaid, a director who retires at an annual general meeting may, if willing to act, be reappointed. If he is not reappointed, he shall retain office until the meeting appoints someone in his place, or if it does not do so, until the end of the meeting".

39. Under the heading "Proceedings of Directors", Table A provided as follows:-

> "88. Subject to the provisions of the articles, the directors may regulate their proceedings as they think fit. …
>
> 89. The quorum for the transaction of the business of the directors may be fixed by the directors and unless so fixed at any other number shall be two. …
>
> 90. The continuing directors or a sole continuing director may act notwithstanding any vacancies in their number, but, if the number of directors is less than the number fixed as the quorum, the continuing

> directors or director may act only for the purpose of filling vacancies or of calling a general meeting.
>
> …
>
> 92. All acts done by a meeting of directors, or of a committee of directors, or by a person acting as a director shall, notwithstanding that it be afterwards discovered that there was a defect in the appointment of any director or that any of them were disqualified from holding office, or had vacated office, or were not entitled to vote, be as valid as if every such person had been duly appointed and was qualified and had continued to be a director and had been entitled to vote."

HH Judge Purle QC's judgment

40. The judge began his judgment by reciting that Robert had been found to be the beneficial owner of at least 75% of the Company's issued share capital, registered in David's name, over which the Randhawas had obtained a charging order. The judge said also that it was probable that Robert is or was also the beneficial owner of the remaining 25%.

41. Having dealt with some of the chronology, the judge said that the purported board meeting of the Company on 28th August 2013 was said to be inquorate because the Articles provided for a quorum of two directors, and a sole director only had power to convene a general meeting and/or to appoint an additional director. Moreover, the quorum for a shareholders' meeting was also two.

42. After reciting further elements of the chronology, the judge said that the Randhawas had changed tack and were "now seeking in effect to produce the result they [had] always wanted, which [was] to disentitle the administrators to remuneration, but by a different route". He then said that his instinctive reaction was that "this smacks at best of an abuse of process", because the argument was previously open to them but not pursued. The judge also thought that the decisions of HHJ Cooke created issue estoppels, because they had proceeded on the basis that the administrators were properly appointed. This was not, however, the principal basis upon which the court had heard argument.

43. The judge then said that the Joint Administrators had contended that David had, since 2009, operated as the sole *de iure* director of the Company running the entirety of its business, so as to create a variation of or a departure from the Articles authorising a sole director to do everything which a board of directors of two might do. The judge concluded that "[f]actually that is well-founded and it appears to have been the approach also of [Robert]".

44. The Randhawas had, according to the judge, always contended that Robert was "the person calling the shots and therefore the person in accordance with whose directions [David] was accustomed to act, even during the period of [Robert's] disqualification". The judge said that there could be little doubt that the appointment of administrators was with the full consent or acquiescence of Robert, and that "[i]t may also be said

that as a de facto director, his approval cured any deficiency in the process, there being in reality two directors, as required by the articles, not one. It is however impossible for me to reach that conclusion, because [Robert] was disqualified and therefore incapable of acting in law or under the [Articles] as a director". A disqualified director could not make up a quorum requirement.

45. The judge's conclusions start at paragraph 28 of his judgment and can be summarised as follows:-

i) The appointment of the Joint Administrators was valid because, from 2009 onwards, there was a consistent course of conduct under which Robert and David informally sanctioned the exercise of all the directors' powers by one director alone, which operated as an informal variation of the Articles.

ii) While the 25 shares held by Belvadere would have passed to the Crown as *bona vacantia* on the company's dissolution, nothing had been done in the intervening 19 years. The probability was, as was almost common ground, that Belvadere was an *alter ego* of Robert, who was therefore beneficially entitled to its 25% shareholding in the Company "subject to restoration to the register, which may now of course be far too late".

iii) There was no provision in the Articles enabling a dissolved corporate shareholder to vote. Nobody could have voted Belvadere's shares, because (a) Belvadere did not exist and no-one else was on the register in its place, (b) neither Robert nor the Crown was a registered shareholder.

iv) In these circumstances, the acquiescence or consent of David as the registered holder or Robert as the beneficial owner of 75% of the Company's shares was sufficient to trigger the *Duomatic* principle (as the judge said (perhaps incorrectly) was assumed in *Tulsesense* [2010] EWHC 244 (Ch), [2010] 2 BCLC 525 at paragraph 43).

v) Where there were voting shares that could not be voted because of some disqualifying feature affecting the person named on the register, the acquiescence of the remaining shareholders is sufficient for *Duomatic* purposes.

vi) But in any event, if it were necessary to go further, the requirement of unanimous consent was here satisfied as the judge had already found that Robert, as beneficial owner of 100% of the shares in the Company, had acquiesced in both the exercise of all the board's powers by the sole director and in the impugned appointments.

vii) The *Duomatic* principle was very flexible and did not require people to assume any particular capacity, so it was no objection to these conclusions that Robert never assented in his capacity as beneficial owner (see *Re Express Engineering Works Ltd* [1920] 1 Ch. 466, and *Parker & Cooper Limited v. Reading* [1926] Ch 975).

viii) If both Robert as beneficial owner of Belvadere and David as registered holder of 75% of the shares were entitled to vote, the informal consent of both of

them was sufficient without the need for any formal meeting. And no quorum requirements could apply to such a non-meeting.

ix) As in Brightman J's decision in *Re Bailey, Hay & Co Limited* [1971] 1 WLR 1357, all those interested in the share capital of the Company allowed the Company to be put into administration knowing it was happening or had happened, so that even if Robert was not the beneficial owner of Belvadere's 25% of the Company's shares, Belvadere was content to let the remaining shareholder run the Company as he wished, and could not be taken as having done anything but acquiesced in all that was done.

x) In any event, the proceedings sought a discretionary remedy which would not be granted where the proceedings smacked of abuse, and where the Randhawas could not be in a better position than Lewis Onions from whom they took an assignment of debt, and who had advised upon and acquiesced in the course that was adopted. Moreover, the Randhawas themselves were estopped as a result of their own conduct in failing to challenge the administration, when the true facts were staring them in the face. Alternatively, they were prevented from raising these points by laches or acquiescence (see *Green v. Gaul (sub nom Re Loftus (Deceased))* [2006] EWCA Civ 1124, [2007] 1 WLR 191 at paragraph 42). It would be unconscionable to allow them to do so.

The Grounds of Appeal

46. The Randhawas have raised the following grounds of appeal contending that HHJ Purle QC was wrong not to have declared that the purported appointment of the Joint Administrators was ineffective. In particular, they contend that the judge was wrong as a matter of law and/or discretion to:-

i) base his decision on arguments and evidence not advanced by the Joint Administrators,

ii) conclude that the Articles were impliedly varied,

iii) conclude that there was informal consent by the Company's members so as to make the sole director's decision effective,

iv) conclude that either the members or the Randhawas agreed to or acquiesced in the appointment of the Joint Administrators in any legally relevant way, and

v) conclude that the Randhawas had abused the process of the court by making the application.

47. The Joint Administrators seek to uphold the order the judge made on the following alternative or additional grounds:-

i) Paragraph 22(2) of Schedule B1 confers on the directors of a company a distinct and separate right to appoint administrators, which does not require compliance also with the management rules in the Articles.

ii) Even if the appointment is defective for non-compliance with the procedural rules in the Articles, it is not invalid by reason of section 40 of the Companies Act 2006 in favour of the Joint Administrators who have acted in good faith.

iii) Even if section 40 does not validate the appointment, the failure to observe internal management rules is a "formal defect" or "irregularity" that should be validated, in the absence of substantial injustice, under Insolvency Rule 7.55.

iv) In any event, it is to be inferred that the management of the Company's affairs was delegated to the sole director in accordance with the Articles, so that he had ostensible authority to make the appointment.

v) The Randhawas cannot be in a better position to challenge the validity of the appointment than their predecessor creditors, the Company's solicitors, from whom they took the assignment of debt, or the shareholders from whom they acquired their shares.

vi) Insofar as the appointment was defective, the Joint Administrators can rely on paragraph 104 of Schedule B1, which validates the actions they have taken in that capacity.

48. On the first day of the appeal hearing, we allowed the Joint Administrators' application for permission to amend their Respondents' Notice to add an additional point, to the effect that the Company was at all material times to be regarded as a single member company under section 318(1) of the Companies Act 2006, and was therefore to be regarded as having a quorum of only one for a members' meeting.

<u>The Randhawas' arguments on this appeal</u>

49. As regards Belvadere and Robert, the Randhawas submitted as follows:-

i) The judge was right to conclude that there was no one entitled to vote Belvadere's shares in the Company, so that those shares were "to be left out of account".

ii) By 2009-2013, Robert would not have acknowledged that he was the beneficial owner of the shares in the Company registered in Belvadere's name.

iii) After Belvadere was dissolved, it was impossible to convene a quorate meeting of the members of the Company, because under Regulation 40 of Table A, a quorum was "*[t]wo persons entitled to vote upon the business to be transacted...*".

iv) The judge was right to conclude that Robert could not be counted as making up the quorum for any meeting of directors because of his disqualification.

v) In consequence, no quorate meeting of the directors of the Company could have occurred after August 2009.

vi) It was, however, common ground that Robert continued to act as a *de facto* or shadow director and the controlling mind of the Company after his disqualification.

50. As regards the *Duomatic* principle, the Randhawas submitted as follows:-

i) The members of a company cannot do informally that which they cannot do formally (see *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797 at page 814F-I per Oliver J, and *Atlas Wright (Europe) Ltd v. Wright* [1999] BCC 163 at 174G-H (CA)).

ii) Accordingly, if any meeting (if convened) would be inquorate because the number of members has fallen below the quorum, those members cannot bind the Company informally without a meeting.

iii) Where a company has a sole remaining registered shareholder, he cannot bind the company without a formal meeting: see *Re New Cedos Engineering Co Ltd supra* at 813c-h, and *Re Tulsesense Ltd supra* at paragraph 41.

iv) In order to be upheld, the transaction in question must be *bona fide* and honest: *Bowthorpe Holdings Ltd v. Hills* [2002] EWHC 2331 (Ch), [2003] 1 BCLC 226, at paragraph 50, per Sir Andrew Morritt V-C (summarising the effect of earlier decisions).

51. In relation to the judge's reasons for holding that the *Duomatic* principle applied, the Randhawas submitted that:-

i) The judge was wrong to hold that the sole remaining shareholder was competent to bind the Company and waive the quorum requirement of the Articles. A sole member could not constitute himself the decision-making organ of the members.

ii) The judge was wrong to hold that David had been conducting the entirety of the business of Company since 2009, since that was at odds with the Joint Administrators' evidence to the effect that Robert had been doing so. It was this error that led the judge wrongly to conclude that there had been an effective variation of the Articles so as to allow David to exercise the powers of the board alone. It was not properly based on the facts and was not bona fide, because it allowed Robert to run the Company whilst disqualified. Moreover, the conduct that might be taken as having amended the Articles was not unambiguous as would be required (see *Re Home Treat Ltd* [1991] BCC 165 at page 167).

iii) The judge was wrong to find that the appointment of the Joint Administrators was made with the full consent or acquiescence of Robert.

iv) The judge was wrong to conclude that Robert and/or David should be treated as having passed a special resolution informally authorising the sole director to appoint administrators alone notwithstanding the Articles, when there could be no quorate members' meeting, and any such resolution would not have been *bona fide*.

v) *In re Bailey Hay & Co Ltd supra* was of no relevance to the situation here where any members' meeting would have been inquorate.

vi) The judge was wrong to place reliance on estoppel and abuse of process, since the Randhawas were interested as holders of a charging order, so not affected by Lewis Onions' knowledge,

The issues as they crystallised at the hearing

52. A disinterested observer might be forgiven for thinking that the previous paragraphs show that the parties had raised on this appeal almost every permutation of every possible argument and perhaps even some impossible arguments.

53. Fortunately, however, the parties confined themselves in oral argument to a less extensive list of issues, which I will attempt to summarise as follows:-

i) Was the Company properly to be regarded at the relevant time as a single member company so as to allow David to make up a valid quorum of one for members' meetings?

ii) Should the judge have held that the sole director of the Company had the right to appoint the Joint Administrators under paragraph 22(2) of Schedule B1 notwithstanding the quorum provisions as to directors' meetings contained in the Articles?

iii) Was the judge right to hold that Articles had been informally varied by a consistent course of conduct by Robert and David?

iv) Was the judge right to conclude that the consent of either David or Robert and David was sufficient in the circumstances of this case to engage the *Duomatic* principle?

v) If not, were the Randhawas estopped from contending that the Joint Administrators had not been validly appointed either (a) by acquiescence, or (b) because it was an abuse of process to raise the matter only in this application?

54. I will not go so far as to say that all the other points raised were abandoned, but they were certainly not vigorously pursued. In a supplementary skeleton argument filed shortly before the hearing, Mr Peter Arden QC, leading counsel for the Joint Administrators, abandoned reliance on section 40 of the Companies Act 2006 (on the basis that the purported appointment was by the directors, not by the company). In the course of the hearing, he abandoned reliance on either paragraph 101 of Schedule B1 or Insolvency Rule 7.55 as curing the defect if it were to be held that his arguments on the *Duomatic* principle did not succeed. I, for my part, think he was right to do so.

55. I, therefore, turn to deal with the main issues. I intend to take the third and fourth issues together because the arguments advanced by Mr Arden in respect of these issues were along the same lines. Moreover, it seems to me to be useful to start by dealing briefly with the essential authorities that have given rise to the current state of the law on the *Duomatic* principle.

The *Duomatic* Principle

56. The *Duomatic* principle can be traced back much further than that case itself. It suffices for present purposes to cite two *dicta*. Warrington LJ in *Re Express Engineering Works Limited* [1920] 1 Ch 466 at pages 470-471 said (in agreement with Lord Sterndale MR):-

> "It happened that these five directors were the only shareholders of the company, and it is admitted that the five, acting together as shareholders, could have issued these debentures. As directors they could not but as shareholders acting together they could have made the agreement in question. … Inasmuch as they could not in one capacity effectually do what was required but could do it in another, it is to be assumed that as business men they would act in the capacity in which they had power to act. In my judgment they must be held to have acted as shareholders and not as directors, and the transaction must be treated as good as if every formality had been carried out."

57. Astbury J in *Parker and Cooper Ltd v. Reading* [1926] Ch 975 said this at page 984:

> "Now the view I take of both these decisions [*Express Engineering Works supra* being one of them] is that where the transaction is *intra vires* and honest, and especially if it is for the benefit of the company, it cannot be upset if the assent of all the corporators is given to it. I do not think it matters in the least whether that assent is given at different times or simultaneously."

58. Buckley J in *In Re Duomatic Ltd supra* in 1969, also relied on *Express Engineering Works supra*, saying this at page 373C-D:-

> "The fact that they did not take that formal step [of convening a general meeting] but that they nevertheless did apply their minds to the question of whether the drawings by Mr. Elvins and Mr. Hanly should be approved as being on account of remuneration payable to them as directors, seems to lead to the conclusion that I ought to regard their consent as being tantamount to a resolution of a general meeting of the company. In other words, I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be. The preference shareholder, having shares which conferred upon him no right to receive notice of or to attend and vote at a general meeting of the company, could be in no worse position if the matter were dealt with informally by agreement between all the shareholders having voting rights than he would be if the shareholders met together in a duly constituted general meeting."

59. In *Re New Cedos Engineering Co Ltd* [1994] 1 BCLC 797, Oliver J said this at 814f-h-

> " … the ratio of Buckley J's decision is that where that which has been done informally could, but for an oversight, have been done formally and was assented to by 100% of those who could have participated in the formal act, if one had been carried out, then it would be idle to insist upon formality as a pre-condition to the validity of the act which all those competent to effect it had agreed should be effected. But, as I see it, this

necessarily rests on the postulate that the persons assenting were, in fact, competent to effect the act to which they have assented. There is nothing whatever in the decision which justifies, much less compels, the conclusion that if they were not competent to do it formally at a meeting, they could do it informally without a meeting".

60. Mummery LJ in *Monecor (London) Limited v. Euro Brokers Holdings Limited* [2003] EWCA Civ 105 made the additional point at paragraph 62 that the *Duomatic* principle was a "sound and sensible principle of company law allowing the members of the company to reach an agreement without the need for strict compliance with formal procedures, where they exist only for the benefit of those who have agreed not to comply with them".

61. In *Sharma v. Sharma* [2013] EWCA Civ 1287, the Court of Appeal considered whether the shareholders of a dental company had acquiesced by their silence in a director acquiring dental practices for her own benefit. Jackson LJ (with whom McCombe and Floyd LJJ agreed) upheld Simon J, who had held that there had been such acquiescence, and that the *Duomatic* principle applied. Having cited Neuberger J in *EIC Services Ltd v. Phipps* [2003] EWHC 1507 (Ch) at paragraph 133 to the effect that it was not enough for acquiescence, without more, to inform shareholders of something without saying that their consent was required, Jackson LJ continued as follows at paragraph 49:-

> "It is relevant to consider whether the circumstances were such that the shareholders would be expected to voice any objections, even if they were not aware of their legal rights. When a court is considering what, if anything, can be inferred from a party's silence, the factual context is a matter of critical importance. If the surrounding circumstances are such that it would be unconscionable for a party to remain silent at the time and only raise his objections later, then I would have thought that assent can be inferred from silence".

Issue 1: Was the Company properly to be regarded at the relevant time as a single member company so as to allow David to make up a valid quorum of one for members' meetings?

62. This was an issue that was raised very late by the Joint Administrators. Nonetheless, no doubt because it is really a purely legal question, Mr Richard Salter QC, leading counsel for the Randhawas, did not object to its introduction.

63. The following further provisions of the Companies Act 2006, in addition to those cited above, are relevant to this argument:-

> "**112 The members of a company**
>
> (1) The subscribers of a company's memorandum are deemed to have agreed to become members of the company, and on its registration become members and must be entered as such in its register of members.

(2) Every other person who agrees to become a member of a company, and whose name is entered in its register of members, is a member of the company.

113. Register of Members

(1) Every company must keep a register of its members.

(2) There must be entered in the register—

(a) the names and addresses of the members,

(b) the date on which each person was registered as a member, and

(c) the date at which any person ceased to be a member. …

114 Register to be kept available for inspection

(1) A company's register of members must be kept available for inspection—

(a) at its registered office …"

123 Single member companies

(1) If a limited company is formed under this Act with only one member there shall be entered in the company's register of members, with the name and address of the sole member, a statement that the company has only one member.

(2) If the number of members of a limited company falls to one, or if an unlimited company with only one member becomes a limited company on re-registration, there shall upon the occurrence of that event be entered in the company's register of members, with the name and address of the same member—

(a) a statement that the company has only one member, and

(b) the date on which the company became a company having only one member.

(3) If the membership of a limited company increased from one to two or more members, there shall upon the occurrence of that event be entered in the company's register of members, with the name and address of the person who was formerly the sole member—

(a) a statement that the company has ceased to have only one member, and

(b) the date on which that even occurred.

(4) If a company makes a default in complying with this section, an offence is committed by—

(a) the company, and

(b) every officer of the company who is in default.

127 Register to be evidence

The register of members is prima facie evidence of any matters which are by this Act directed or authorised to be inserted in it."

318 Quorum at meetings

(1) In the case of a company limited by shares or guarantee and having only one member, one qualifying person present at the meeting is a quorum".

64. Mr Arden submits that the change to allow single member companies was effected in 1992 by regulations made pursuant to the 12th Company Law Directive of the then European Communities. He said that a company may now move in and out of the class of "single member companies" over its lifetime, and that the death or dissolution of a member would be one event that could cause a company with two members to become a single member company. He drew support for this position from Article 29 of Table A, which is incorporated in the Articles as follows:-

> "If a member dies the survivor or survivors where he was a joint holder, and his personal representatives where he was a sole holder or the only survivor of joint holders, shall be the only persons recognised by the company as having any title to his interest; but nothing herein contained shall release the estate of a deceased member from any liability in respect of any share which had been jointly held by him."

65. The commentary to this Article in *Buckley on the Companies Acts* suggests that when a member dies, his personal representative is not to be counted as a member of the company:-

> "It was held in *Re Bowling and Welby's Contract* [[1895] 1 Ch 663] that a deceased shareholder did not count as a member for the purposes of making up the requisite number of members to give the court jurisdiction to wind up an unregistered company under [the Companies Act] 1862, s 199. Semble, this decision is authority for the proposition that a deceased shareholder does not count towards the minimum number of members which [the Companies Act] 2006 requires…"

66. Mr Arden's submission is, therefore, that, on the dissolution of Belvadere, the Company became a single member company, and David became its single member. When he formed an inquorate board to appoint the Joint Administrators, the *Duomatic* principle operated to validate the appointment. If he is right, Mr Salter's various objections to the application of the *Duomatic* principle fall away, because the general meeting of a single member company would have been able formally to authorise its directors to appoint administrators.

67. Mr Arden relies on *Re Bowling and Welby's Contract supra* for support. The question there was whether an unincorporated building society was liable to being wound up under section 199 of the Companies Act 1862, which provided as follows:-

> "[S]ubject as hereinafter mentioned, any partnership, association, or company, except railway companies incorporated by an Act of Parliament, consisting of seven members and not registered under this Act, and hereinafter included under the term unregistered company, may be wound up under this Act".

68. The building society had only four living members at the time a winding-up petition was presented. The question was whether the executors of three deceased members and the trustee of an eighth bankrupt member could count towards the statutory headcount to make the winding up procedure in section 199 available to the society. The Court of Appeal (Lord Halsbury, Lindley and A.L. Smith LJJ) held that they could not be counted. Lindley LJ said this at pages 669-670:-

> "What is the meaning of 'members'? The word must be applicable to all partnerships or associations except railway companies which are not registered under this Act. The statute gives no definition of 'members' applicable to all the various kinds of societies to be wound up under this Act … But, when you come to look at each particular company, you must look at the constitution of that company, and see what constitutes membership in it. You must look at the rules of the company. The *Building Societies Act* of Will. 4 does not throw any light on it. Building society rules are not very intelligible as they are usually framed, and it is not very easy to find what constitutes a member of a particular society; but if you look at the rules of this society member means a person who subscribes to the funds of the association, and who is admitted as a member on the payment of a certain fee, and every member who pays his fees is entitled to a share. Now, did this society then consist of seven members when this winding-up happened? It had a few members, but a very few members. It had had a great many past members, and it had some deceased members, and, as the evidence stood before Mr Justice Stirling, what appeared was this—there were four existing members, and some deceased members, and a bankrupt member. That is perfectly correct. You cannot look upon the executors and administrators of a deceased member as being 'members' unless they become such. They may be sued in their representative character in respect of the obligations to the deceased; but executors and administrators will not become members of such a society without doing something to make them members. Then is a trustee of a bankrupt member a member? Not at all. It's altogether wrong in point of law, and it would be most disastrous as a matter of business if it were so."

69. Mr Salter, in reply, relied on three subsequent cases:-

i) In *James v. Buena Ventura Nitrate Grounds Syndicate, Limited* [1896] Ch 456, the Court of Appeal (Lord Herschell, Rigby and A.L. Smith LJJ) held that a deceased member of a company registered under the Companies Act 1862 was a "member" for the purposes of the articles of a company which gave members a share purchase option. *Re Bowling and Welby's Contract supra* was cited. Lord Herschell said this at page 464:-

> "It is no doubt the fact that, strictly speaking, although Mr James's name was, at the time of the resolution of April, 1893, still on the register, he was not, being dead, a member of the company. It seems to me, however, perfectly clear that the word 'member', as used in some of the articles of

the company, must be held to include those whose names are on the register, though they are no longer living".

ii) In *Llewellyn v. Kasintoe Rubber Estates, Limited* [1914] Ch 670, executors (who had not yet had the deceased's shares registered in their own names) were held to have the right to restrain the liquidator from carrying out a scheme of reconstruction adopted under section 192 of the Companies (Consolidation) Act 1908. Astbury J held at page 676 that, for the purposes of that section, "the estate of a deceased member must be a member of the company within the meaning of that expression". He distinguished *Re Bowling and Welby's Contract* at page 681 on the basis that it concerned unregistered societies, and did not govern the case before him. His judgment was affirmed on appeal. Swinfen Eady LJ said this at page 683:-

"It is beyond dispute that the word 'member', used in the statute of 1908 and in the articles of association of this company, is used sometimes as referring to a member on the register, and also sometimes as including and extending to a deceased member and the estate of a deceased member. It is beyond dispute that the word bears from time to time one or both of those meanings, and sometimes one and sometimes the other. The question is, therefore, does it in s. 192 sub-s. 3, include the estate of a deceased member?"

He held that it did.

iii) Finally, Buckley J held in *In re Bayswater Trading Co Ltd* [1970] 1 WLR 343 that the estate of an intestate shareholder had standing to have a dissolved company restored to the register in order to access the company's bank account, which involved treating the personal representative of a deceased shareholder as a "contributory" for the purposes of section 224 of the Companies Act 1948.

70. These authorities make clear that the meaning of "member" in any given context is primarily a matter of construction of the statute and the company's constitution.

71. In my judgment, the word "member" in regulation 40 of Table A included in the Articles and in the sections of the Companies Act 2006 to which Mr Arden has referred includes any member registered on the companies register, whether alive or dead, and, if corporate, whether subsisting, in an insolvency procedure or dissolved. I say this for the following main reasons:-

i) As a simple exercise in statutory construction, the modern provisions of the Companies Act 2006 that I have set out above clearly envisage that the members of a company are those persons recorded in the company's register. That is clear from each of section 112(2) which provides that "every other person … whose name is entered in its register of members, is a member …", section 113 providing for what is to be recorded in the register of a company's members, section 114 providing that the register must be kept available for inspection, section 127 providing that the register of members is prima facie evidence of any matters in it, and from section 123 itself which provides by sub-section (2) that if a company becomes a single member company, the one

member and the date he became the sole member must be stated on the register.

ii) The term "a limited company … with only one member" in section 123 must be referring to a limited company with only one registered member. If that were not the case, it would be necessary for those involved with the company to ascertain the status (i.e. alive or dead for natural persons, or existing or dissolved for corporations) of each registered member before one could know whether the company was a single member company or not. Moreover, section 123 itself provides for a regime by which single member companies must enter that fact on the register (with a criminal sanction). No such entry was, of course, made in the case of the Company.

iii) Whilst not directly binding, the line of cases cited by Mr Salter starting with *James v. Buena Ventura supra* demonstrates that, in construing other aspects of companies legislation, the courts have often held that a "member" can include a deceased (or presumably dissolved) member, and that the situation in *Re Bowling and Welby's Contract supra* was a special one arising from the specific requirements of the section being construed in that case in the context of an unincorporated association of individuals, as distinct from an incorporated entity with a legal existence separate to its corporators. Although it is evident that a person must exist to be registered as a member, and that there is *prima facie* no person in existence in the case of a deceased or dissolved member, it is more appropriate to construe the term "member" as encompassing the member's successor in title than to deem the company transformed into a "single member company" for the purposes of section 318 upon the occurrence of death or dissolution.

iv) The provisions in article 29 of Table A allowing the Company only to recognise the personal representatives of a deceased shareholder do not point towards a dissolved member losing the status of member. The provision is a mechanical one to enable the company to know with whom it needs to deal when a member dies.

72. Accordingly, in my judgment, the Company never became a single member company, because Belvadere remained on the register as the holder of 25% of the shares in the Company, even though it (Belvadere) had been dissolved. The Company's register may have been in need of amendment to reflect the actual current ownership of the shares registered in the name of Belvadere, but that fact alone does not transform the Company into a single member company. In these circumstances, the applicability of the *Duomatic* principle can only be considered on the basis that the judge actually considered it, namely how it is to be applied to a company with two members, one of which was a dissolved corporation. I will deal with that question under the third and fourth issues below.

<u>Issue 2: Should the judge have held that the sole director of the Company had the right to appoint the Joint Administrators under paragraph 22(2) of Schedule B1 notwithstanding the quorum provisions as to directors' meetings contained in the Articles?</u>

73. The Joint Administrators' central argument was that paragraph 22(2) of Schedule B1 confers a separate right on the directors of a company to appoint administrators. Mr

Arden drew a distinction between a "right" and a "power" enuring to the directors as such, on the basis that a right is "inalienable" whereas a power can be displaced or limited. That right, he said, is distinct from the one in paragraph 22(1) of Schedule B1 conferred on a company itself, and cannot be constrained by the internal management rules contained in the articles of association. It is analogous to the right of the directors to present a petition to wind up the company under section 124 of the Insolvency Act 1986. Accordingly, the Joint Administrators submit that Sir Andrew Morritt C was wrong in *Minmar (929) Ltd v. Khalastchi* [2011] EWHC 1159 (Ch) to hold at paragraphs 49ff that paragraphs 22(2) and 105 of Schedule B1 did not allow the directors of a company to appoint administrators without complying with the formal requirements of the articles as to directors' meetings and resolutions.

74. Mr Arden relied first and foremost on *In re Peveril Gold Mines, Limited* [1898] 1 Ch 122, where the Court of Appeal held that the right of a contributory to petition to wind up a company under section 82 of the Companies Act 1862 could not be excluded or limited by the articles of association of the company (which in that case required the approval of a board resolution or the consent in writing of two directors to such a petition). Lindley MR said that "[a]ny article contrary to [sections 79 and 82] – any article which says that the company is formed on the condition that its life shall not be terminated when any of the circumstances mentioned in s.79 exist, or which limits the right of a contributory under s.82 to petition for a winding up, would be an attempt to enforce on all the shareholders that which is at variance with the statutory conditions and is invalid" (see Byrne J at first instance at page 124, Lindley MR on appeal at page 131, and Chitty LJ at page 132). Moreover, the correctness of the decision in *Peveril supra* was not doubted by the Court of Appeal in *Fulham Football Club (1987) Ltd v. Richards* [2012] Ch 855 at paragraphs 80-3. Patten LJ simply said at paragraph 82 that the decision in *Peveril* was limited to the narrow point of whether the article could effectively restrict or re-model the conditions for the presentation of a petition under what would now be section 122 of the Insolvency Act 1986. Mr Arden also relied on the New South Wales Supreme Court decision in *Medical Research and Compensation Foundation v. Amaca Pty Ltd* [2004] NSWSC 1227, where Young CJ had reached a similar conclusion to that arrived at in *Peveril* under the Corporations Act 2001.

75. In their skeleton argument, the Joint Administrators had referred to a number of recent first instance decisions reflecting a not entirely consistent approach to the validity of out of court appointments of administrators and the proper construction of the provisions relating to the giving of notice (see in particular *In re Melodius Corporation* [2015] EWHC 621 (Ch) [2016] Bus LR 101, where Sir Terence Etherton C held at paragraphs 70-77 that a resolution of one director at an inquorate board meeting appointing an administrator was invalid). I mean no disrespect to these decisions by not referring to them in detail here, but none of them takes the matter much further than *Minmar supra*, and they are not, of course, binding on this court. In addition, most of them concerned the question of whether one or both of rule 7.55 of the Insolvency Rules 1986 and paragraph 104 of Schedule BI could cure any defect. Neither of these provisions is any longer relied upon in this case.

76. In this connection, however, it is worth mentioning the decision in *In re Equiticorp International plc* [1989] 1 WLR 1010, where Millett J considered the meaning of the section 9(1) of the Insolvency Act 1986 which provided that a petition for an

administration order could be presented "either by the company or the directors". Millett J held that the words "the directors" meant all the directors, but that those voting against a resolution to present such a petition were bound by the decision of the majority.

77. Before turning to the issues that the judge dealt with in relation to the *Duomatic* principle, it is, therefore, necessary to deal with the Joint Administrators' argument that David's resolution to appoint them was valid *per se* as a resolution of the sole director of the Company, notwithstanding the quorum provisions of Articles 89 and 90 of Table A (recited above), which required a quorum of two directors at any board meeting, and only enabled a sole director to be able to act for the purpose of filling vacancies or of calling a general meeting.

78. In my judgment, the Joint Administrators are wrong to suggest that the provisions of paragraph 22(2) of Schedule B1 are sufficient to override these provisions of the Articles. First, and perhaps least importantly, paragraph 22 of Schedule B1 appears directly under the sub-heading "Power to appoint", so it appears at least that the statutory draftsman thought they were creating a power in the directors, not granting a right to them in the manner of that described in *Peveril supra.* Secondly, it is beyond doubt that either the company itself or the directors may appoint an administrator under paragraph 22 of Schedule B1, but there is nothing in Schedule B1 to suggest that either the company or the directors can act except in the manner set out in the articles of association under which the company was incorporated and by which the corporators agreed to be bound. Moreover, there is nothing in articles 89 or 90 that seeks expressly or impliedly to override or restrict the power of the directors to appoint an administrator. Those articles are not of the same character as the article in *Peveril supra* that sought actually to restrict the right of a contributory to present a petition to wind up the company under the Companies Act 1862 to situations where certain additional consents or permissions had been obtained. Here, the relevant articles merely provide for the manner in which the directors can validly act; they do not restrict the directors from acting under paragraph 22 of Schedule B1 or any other statutory provision. I respectfully find myself in agreement with the reasoning of Sir Andrew Morritt C in *Minmar supra* at paragraphs 49-52 to the effect that there is no notion of informality in the provision allowing the directors of a company to appoint an administrator. This approach seems to me to be consistent with the decision of Millett J in *Equiticorp supra*, and also with the general requirement of company law that the provisions of the articles of association cannot be ignored. It is also worthy of note that HHJ Purle QC did not himself hold that David's resolution at the inquorate board meeting was valid without the application of the *Duomatic* principle.

79. Accordingly, I conclude that the judge was wrong to have held that the sole director of the Company had the right to appoint the Joint Administrators under paragraph 22(2) of Schedule B1 notwithstanding the provision in the Articles requiring a quorum of 2 directors at board meetings of the Company.

<u>Issue 3: Was the judge right to hold that Articles had been informally varied by a consistent course of conduct by Robert and David?</u>

<u>Issue 4: Was the judge right to conclude that the consent of either David or Robert and David was sufficient in the circumstances of this case to engage the *Duomatic* principle?</u>

80. I can now take these central issues relatively shortly. Mr Arden does not gainsay any of the authorities on the *Duomatic* principle that I have already cited. Instead, basing himself on a dictum in *Atlas Wright (Europe) Ltd.* [1999] BCC 163 per Potter LJ at 175A-B, he submits that the court should look at the "underlying rationale of the particular formality in question" when it is considering whether it can overlook the lack of any particular formality in applying the *Duomatic* principle.

81. In my judgment, however, regard must be had to the *Duomatic* principle itself. As Buckley J framed it at page 373 in *Duomatic* itself: "I proceed upon the basis that where it can be shown that all shareholders who have a right to attend and vote at a general meeting of the company assent to some matter which a general meeting of the company could carry into effect, that assent is as binding as a resolution in general meeting would be". Without labouring the point, those who must assent are "all shareholders who have a right to attend and vote at a general meeting of the company", not those of the shareholders that may be available at the time.

82. In these circumstances, having decided that Belvadere was a registered member of the Company at the relevant time, and that it was neither notified of the proposal to appoint an administrator nor assented to any such course, it is hard to see how the *Duomatic* principle was applicable unless, as the judge effectively held, its assent could either be dispensed with or provided by Robert.

83. It is, of course, difficult anyway to see how a dissolved corporation could be notified of a proposal or assent to it. But this may not be the appropriate case in which to embark, in the absence of detailed argument, on a discussion about the precise status of a non-existent person who is still on the register of members. It is clear, for the reasons I have already given, that such a person must be treated as still a member for various statutory purposes. But meetings with quorums are real events attended by real people, and only a real person can give consent to something. Whatever, therefore, the precise status of such a member might be, it seems to me that the *Duomatic* principle simply cannot apply in a situation where one of the registered shareholders is a corporation which does not exist, because it requires the consent of all the registered shareholders and one of them is incapable of consenting. *Duomatic* is a valuable principle, but it would be wrong to assume that it must always be capable of applying.

84. I have already explained why, in my judgment, Belvadere's membership of the Company cannot be ignored under the applicable legislation, just because it was dissolved. The question then turns on whether the judge was right to think that Robert's consent could be taken as providing sufficient approval on behalf of Belvadere. In my judgment, even if it were to have been shown that Robert owned Belvadere (about which I need express no view), his consent could not have been relevant in the circumstances of this case. Belvadere was dissolved. It was common ground that, in those circumstances, the property of Belvadere had passed to the Crown under Manx law. It was not suggested, nor could it have been, that the Crown consented to the course that David adopted. The fact that the company might perhaps have been capable of restoration to the register (which the judge doubted anyway) can have no effect on the entity entitled at the relevant time to the property in the 25% shareholding in the Company. That entity was the Crown. For what it is worth, I would be reluctant to express any view on whether it would be sufficient in any event for *Duomatic* purposes to obtain the consent of the person ultimately entitled to the

beneficial interest in a shareholding if there is nobody entitled in formal terms to agree on behalf of the registered shareholder. It might be that the personal representatives of a deceased shareholder could provide relevant consent because of article 29 of Table A (set out above), but that was not the question that arose in this case, and I should not be taken as having made any decision to that effect.

85. In these circumstances, I do not need to deal with the arguments that were addressed to the question of whether Robert was or was not the beneficial owner of Belvadere, or to whether he in fact agreed to or acquiesced in the resolution to appoint the Joint Administrators. As it seems to me, David's resolution was incurably invalid. It could not be rendered valid by the application of the *Duomatic* principle, which only applies, as I have said, where "all shareholders who have a right to attend and vote at a general meeting of the company" assent to the course proposed. In this case, Belvadere did not assent, and its assent cannot be inferred by looking to what those who may previously have had an interest in Belvadere may or may not have thought.

86. The same problem, in my judgment, affects the judge's conclusion that David and Robert's conduct could be taken to have amended the Articles so as to allow David to exercise the powers of the board alone. Such a variation can only have taken effect by the application of the *Duomatic* principle, but Belvadere, as the owner of 25% of the Company, never consented to the supposed variation actually or putatively. As Newey J put the matter in *Re Tulsesense supra*: "In short, this is a case where the articles were not … followed, not one where they were modified or disapplied".

87. In these circumstances, the only possible conclusion is that the judge was wrong to hold both that the Articles had been informally varied by a consistent course of conduct by Robert and David, and that either David alone or Robert and David together could validly approve a resolution to appoint the Joint Administrators under the *Duomatic* principle.

88. I need, therefore, to proceed to consider whether the doctrines of acquiescence and/or abuse of process can validate the appointment of the Joint Administrators.

<u>Issue 5: If not, were the Randhawas estopped from contending that the Joint Administrators had not been validly appointed either (a) by acquiescence, or (b) because it was an abuse of process to raise the matter only in this application?</u>

89. As I have already recorded, the judge's main concern under this heading appears to have been that the Randhawas' application impugning the validity of the appointment of the Joint Administrators, coming as it did after the two hearings before HHJ Cooke had been conducted on the supposition that the appointment was valid, was an abuse of the process of the court. The judge thought that a party ought to put forward the entirety of its case at one and the same time, so that the Randhawas were trying illegitimately to take a second bite at the cherry.

90. The principles of abuse of process estoppel are now well established by the House of Lords' decision in *Johnson v. Gore Wood & Co* [2002] 2 AC 1, and more recently by the Supreme Court in *Virgin Atlantic Airways Ltd v. Zodiac Seats UK Ltd* [2014] AC 160. Lord Bingham said this at page 31 in *Johnson supra*:

"But *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and of the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

91. As regards acquiescence, the law was summarised authoritatively by Chadwick LJ in *Green v. Gaul (sub nom Re Loftus) supra* at paragraph 42 as follows:-

"The modern approach to the defences of laches, acquiescence and estoppel was considered by this Court in *Frawley v Neill* ([2000] CP Reports 20, but otherwise unreported, 1 March 1999) to which reference was made in the judgement of Lord Justice Mummery in *Patel v Shah* ([2005] EWCA Civ 157, [32]). After reviewing the earlier authorities — and, in particular, observations in *Lindsay Petroleum v Hurd* (1874) LR 5 Privy Council 221, 229 and *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1279 — Lord Justice Aldous (with whom the other members of the Court agreed) said this:

> 'In my view the more modern approach should not require an inquiry as to whether the circumstances can be fitted within the confines of a preconceived formula derived from earlier cases. The inquiry should require a broad approach, directed to ascertaining whether it would in all the circumstances be unconscionable for a party to be permitted to assert his beneficial right. No doubt the circumstances which gave rise to a particular result in the decided cases are relevant to the question whether or not it would be conscionable or unconscionable for the relief to be asserted, but each case has to be decided on its facts applying the broad approach.'"

92. In this case, the complaints made against the Randhawas are, in short, that they did not challenge the validity of the appointment until after HHJ Cooke had ruled on the second application before him, and that they could not have any better right than they had acquired either from Lewis Onions as assignee of their debt, or from Robert's trustees in bankruptcy when they acquired the 75% shareholding in the Company. Both Lewis Onions and Robert had approved the appointment of the Joint Administrators.

93. Again, I think I can deal with these points quite shortly. First, the question of whether a company is in an insolvency process or not is a question of that company's legal status. It does not seem to me, therefore, that the position of the Randhawas can materially affect the legal question of whether the Company was or was not validly put into administration on 11th September 2013.

94. I can envisage circumstances in which it might be argued that a particular person did not have the *locus standi* or the right to challenge the validity of the appointment of a liquidator or an administrator, but in my judgment such circumstances did not exist in this case.

95. The high point of the Joint Administrators' case was that, in August 2014, the Randhawas assumed control of the Company when Mr Gursharan Randhawa became the sole director of the Company. Thereafter, according to Mr Gursharan Randhawa's 3rd statement dated 26th October 2014, the Randhawas and their solicitors obtained a great deal of documentation and information about the Company and considered the validity of the appointment of the Joint Administrators, before ultimately deciding not to challenge it before HHJ Cooke at the hearing in March 2015 on the basis of an allegedly defective notice.

96. In my judgment, the challenge made before HHJ Cooke in March 2015 was not actually inconsistent with the Randhawas' subsequent contention that the appointment of the Joint Administrators was itself invalid. That challenge was to the Joint Administrators' remuneration on the basis of what they had actually done in the course of the administration. I would not hold in this case that, because the challenge to the validity of the appointment on the current basis *could* have been raised in the earlier proceedings before HHJ Cooke, it therefore *should* have been raised in those proceedings, so that the failure to do so constituted an abuse of process.

97. The points that have been argued in these proceedings have been technical ones concerning the internal management of the Company. Whilst the Randhawas certainly had the ability to start their own investigation of those affairs after August

2014, the Joint Administrators had a significant head start on them. As Sir Terence Etherton C implied in *Melodius supra* at paragraph 76, the administrators could themselves have been expected to check that their appointment was valid as long ago as September 2013, when it was made. They had the Articles and a copy of the resolution appointing them. That resolution contained a clear inaccuracy, when it said that David constituted a quorum for the directors' meeting. A brief inspection of the Articles would have uncovered that inaccuracy. As it seems to me, the Randhawas had no particular reason to investigate that specific problem, whilst the Joint Administrators ought to have done so immediately they were appointed if not before they accepted their appointment. Mr Turpin had been present at the director's meeting of 28th August 2013, at which the appointment of the Joint Administrators was tabled, and the minutes of which also wrongly recorded as being quorate, but he failed to investigate the matter to ensure that the appointment of his firm would be valid.

98. In these circumstances, I disagree with the judge that the application before him smacked of abuse of process. Nor do I think that the Randhawas can have been estopped by acquiescence from raising the validity of the appointment of the Joint Administrators. The right to apply to the court is vested in any creditor under paragraph 74 of Schedule B1. They did not have any involvement in the appointment of the Joint Administrators. It would be quite inappropriate for them to be prevented from questioning the legal status of the Company, just because they acquired their interest as creditor or shareholder at arm's length and for full value from someone who consented inappropriately to an invalid resolution to appoint the Joint Administrators.

99. Moreover, nothing in the case of *Re Bailey Hay & Co Ltd supra* shows that such acquiescence can prevent the challenge that has been made. In that case, those who were held to have acquiesced in the appointment of a liquidator were two directors who had knowingly abstained when the quorate board meeting considered the question of a winding up. The Randhawas were not involved in the affairs of this Company when David passed the invalid resolution that has caused this litigation.

100. I would, therefore, hold that the judge was wrong to think that the Randhawas were estopped from contending that the Joint Administrators had not been validly appointed either (a) by acquiescence, or (b) because it was an abuse of process to raise the matter only in this application.

Conclusions

101. For the reasons I have given, I would hold that the appointment of the Joint Administrators was invalid. I would, therefore, allow the appeal and make a declaration to that effect.

Lord Justice Underhill:

102. I agree.

Lord Justice Henderson:

103. I also agree.