Neutral Citation Number: [2024] EWCA Civ 934

Case No: CA-2023-002131

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
His Honour Judge Hodge KC (sitting as a Judge of the High Court)
[2023] EWHC 2805 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday 5 August 2024

Before :

LADY JUSTICE KING
LADY JUSTICE ASPLIN
and
LORD JUSTICE SNOWDEN

- -

IN THE MATTER OF JDK CONSTRUCTION LIMITED

Between :

ANDREW BLAND and JANET FRANCIS MAYO	**Applicants/ Respondents**
- and –	
JEANETTE KEEGAN	**Respondent/ Appellant**

- -

Steven Fennell (instructed by **Mills & Reeve LLP**) for the **Appellant**
Louis Doyle KC and Douglas Cochran (instructed by **Primas Law**) for the **Respondents**

Hearing date : 9 May 2024
(additional written submissions received on 26 July 2024)

- -

Approved Judgment

This judgment was handed down remotely at 10.30 a.m. on Monday 5 August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Snowden:

1. This appeal raises an important point about the reliance which can be placed upon the entries in the register of members of a company when determining the validity of a written resolution appointing voluntary liquidators to that company.

2. The resolution in question was signed by the person who was shown as the holder of all the issued shares in the company in the register of members at the time. However, one half of those shares had been registered in her name following her unauthorised execution of a stock transfer form in the name of the Appellant, who was the person previously shown on the register of members as the holder of those shares.

3. HHJ Hodge KC (the "Judge") held that, even on the footing that the stock transfer form was a forgery, the register of members was conclusive as to the identity of the members of the company at any particular point in time, so that the written resolution was valid and effective.

4. That decision is challenged on appeal by the Appellant. She contends that the transfer of her shares, the entry on the register and the resolution for winding up and the appointment of the liquidators were all void and of no effect.

5. The appeal is resisted by the Respondents who were appointed as liquidators by the resolution, and who incurred significant fees and expenses winding up the company before the liquidation was stayed whilst the validity of their appointment was resolved.

Background

6. As might be appreciated from the short summary above, the facts of this case are unusual. The course of these proceedings was also unusual. The background was set out at some length in the Judge's *ex tempore* judgment: [2023] EWHC 2805 (Ch) (the "Judgment"). For present purposes it can be more shortly stated.

7. JDK Construction Limited (the "Company") was incorporated in 2013 with a share capital of 100 ordinary shares of £1 each. The sole subscriber to the Company's memorandum, and the holder of all the issued shares was the Appellant, Jeanette Keegan ("Jeanette"), who was also the sole director of the Company.

8. In reality, the business of the Company was controlled and managed by Jeanette's son, Darren Keegan ("Darren"). Darren had married Julie Keegan ("Julie") in 2012, and in October 2015 Julie became a second director and acquired 50 ordinary shares in the Company by transfer from Jeanette. That transfer and appointment were reflected in electronic filings made at Companies House.

9. The personal relationship between Jeanette on the one hand, and Darren and Julie on the other, broke down in early 2019. On 20 April 2019 Julie executed a stock transfer form purporting to transfer the remaining 50 ordinary shares held by Jeanette to herself (the "Stock Transfer Form"). She did so by signing "J. Keegan" in the box on the form indicated as being for the signature of the transferor. Electronic filings reflecting a transfer of Jeanette's shares to Julie and the termination of Jeanette's

appointment as a director of the Company were made at Companies House on or about 1 May 2019.

10. Jeanette and her son were reconciled in about March 2021, by which time Darren's marriage to Julie had broken down. The couple subsequently separated and divorce proceedings were commenced.

11. On 16 July 2021, purporting to act as sole member of the Company, Julie signed a written resolution of the Company (the "Written Resolution"). That resolution resolved (1) by special resolution that the Company be wound up voluntarily, and (2) by ordinary resolution that the Respondents be appointed joint liquidators. For convenience, whilst recognising that their status is in dispute, I shall refer in this judgment to the Respondents as the "Liquidators".

12. After Jeanette became aware of the Written Resolution, her solicitors wrote to Julie on 13 September 2021, denying that she had signed the Stock Transfer Form, and contending that the Written Resolution was invalid. Correspondence ensued between Jeanette's solicitors, the Liquidators and Julie.

13. There was then a delay before the Liquidators issued an application under the Insolvency Act 1986 (the "Insolvency Act") over a year later on 6 October 2022, seeking a declaration that their appointment as liquidators of the Company was valid and/or for further directions (the "IA Application"). The respondents to that application were Jeanette and the Company.

14. In their evidence in support, the Liquidators explained that they had not managed to locate a physical register of members of the Company. They relied instead on the electronic filings at Companies House as to the members of the Company from time to time to contend that the Written Resolution and their appointment were valid. In response to the application, Jeanette and Darren each filed witness statements denying that they had signed the Stock Transfer Form. In her statement, Jeanette contended that the Stock Transfer Form had been forged by Julie, with the result that the Written Resolution for the winding up of the Company and the appointment of the Liquidators was invalid.

15. The IA Application came before the Judge on 28 October 2022. On that date, Jeanette's counsel told the Judge that she intended to issue a claim for rectification of the Company's register of members. The Judge then adjourned the IA Application, ordered it to be re-listed for consideration by the trial judge after delivery of judgment in the intended rectification claim, and stayed the liquidation of the Company in the meantime.

16. On 14 November 2022, Jeanette duly issued a Part 7 claim form against Julie and the Company (the "Part 7 Claim"). The Part 7 Claim sought a declaration that the Stock Transfer Form was a forgery and void, a declaration that Jeanette's name had been removed from the Company's register of members without cause and that Jeanette held 50 of the 100 issued ordinary shares in the Company, and an order pursuant to section 125(1) of the Companies Act 2006 (the "Companies Act") rectifying the register of members accordingly.

17. Jeanette's Particulars of Claim stated that she had not joined the Liquidators or sought any declaratory relief in respect of their appointment in the Part 7 Claim because she intended to ask the Court to make a declaration as to the invalidity of the Written Resolution in the IA Application.

18. In the Defence, which was signed with a statement of truth, Julie addressed the allegation that she had forged Jeanette's name on the Stock Transfer Form. Paragraph 12(d) stated,

> "It is admitted that [Julie] signed the [Stock Transfer Form], but it is denied that she did so with the intention of forging, or purporting to forge, the signature of [Jeanette], or of any other person. [Julie] intended to sign, and did as a matter of fact sign, the [Stock Transfer Form] in her own capacity, i.e. as herself. The circumstances in which she did so were that Darren placed the [Stock Transfer Form] in front of her, and aggressively demanded that she sign it, raising his voice in the process. Darren informed [Julie], when placing the [Stock Transfer Form] before her, that it was an "internal" Company document that she was required to sign in order to resolve a dispute that had arisen between himself and [Jeanette] in respect of tax on dividends. [Julie] signed the [Stock Transfer Form] on that basis, i.e. that (i) she was aggressively told to do so by Darren, (ii) did not properly consider its contents, and believed Darren when he told her it was an internal document that she was required to sign in order to end a disagreement between Darren and [Jeanette] and (iii) she did not intend to forge, and did not forge, the signature of [Jeanette]."

19. On 2 June 2023, the Part 7 Claim was stayed on the terms of an agreement between Jeanette, Darren and Julie and which was set out in a Schedule to an order (the "Tomlin Order") made by a District Judge. That Schedule included the following terms,

> "1. [Julie] acknowledges that she does not own the 50 shares in the [Company] purportedly transferred to her on 20 April 2019 from [Jeanette].
>
> 2. Julie will transfer the 50 shares that she does own to [Jeanette] for the consideration of £1.00 within 2 working days of receipt of a sealed copy of the [Tomlin Order].
>
> …
>
> 4. Julie shall cause to appoint [Darren] as director of the [Company] and immediately after Darren's appointment resign as director of the [Company] herself….
>
> 5. Darren agrees to indemnify Julie against all and any claims made against her by the [Company] in relation to any matter arising on or before the date of this Agreement …

> 6. Darren shall pay the contribution of £8,000 plus VAT to Julie in respect of costs of this action on an ex-gratia basis and without any admission of liability.
>
> …
>
> 8. This Agreement is in full and final settlement of, and each of Darren and Julie hereby releases and forever discharges, all and/or any actions, claims, rights, demands and set-offs, whether in this jurisdiction or any other, whether or not presently known to the parties or to the law, and whether in law or equity, that it ever had, may have or hereafter can, shall or may have against the other party arising out of or connected with [the Company] …"

20. It will be appreciated that the agreement attached to the Tomlin Order had a number of oddities. Specifically, clause 1 did not indicate what was intended to happen in relation to the entries on the register of members in respect of the shares that had been the subject of the Stock Transfer Form. Another unexplained feature of the agreement was that, unless the resolution for winding up was set aside, the transfer of shares provided by clause 2 would be void unless sanctioned by the Liquidators or the Court: see section 88 of the Insolvency Act. The Liquidators had not, however, been involved in the negotiations leading to the Tomlin Order and were not asked to consent to it or to the terms of the agreement set out in the Schedule, either in their own capacity or on behalf of the Company.

21. Upon learning of the settlement of the Part 7 Claim, the Liquidators applied to restore the IA Application. That matter came before the Judge on Friday 13 October 2023.

The Judgment

22. In his Judgment, the Judge first indicated, at [10]-[11], that in the absence of any copy of the Company's register of members in evidence, he would proceed upon the footing that the Company's accountants, who had made the various electronic filings at Companies House, had also made corresponding entries in the register of members. He thus concluded that the register of members would have shown that Julie was the sole holder of all 100 ordinary shares in the Company at the time of the Written Resolution.

23. After setting out the background that I have summarised above, the Judge stated, at [30]-[32],

> "30. Mr. Fennell [for Jeanette] has invited the court finally to determine all outstanding matters today. He submits that nothing is to be gained by any further investigation of the evidence. There has been no application for cross-examination of either Darren or Jeanette. There is no evidence before the court from Julie, beyond the defence to the rectification claim, which she has verified by a statement of truth.

> 31. Mr. Fennell submits that nothing is to be gained by any further investigation of the evidence. There has been no suggestion that Jeanette in any way authorised the forging of her signature on the [Stock Transfer Form], or that she has in some way acquiesced in that transfer, or is estopped from denying [sic] that it is a forgery. I accept that submission. I can see that no valid purpose is to be served by any attempt at any further investigation of the facts of this case.
>
> 32. Mr. Cochran [for the Liquidators] began by emphasising that the [Liquidators] have been placed in an invidious position. As innocent liquidators, they find themselves caught in the middle of what has been an unsavoury shareholders' dispute between Julie, on the one hand, and Jeanette and Darren, on the other. He emphasises that this [Company] has at all times been a creature of Darren, and that it is he who stands to gain from removing the [Liquidators] from office, because it is he who is in *de facto* control of the [Company]. Mr. Cochran submits that the limited evidence before the court suggests that it is Darren who was the person who effectively orchestrated the production and use of the share transfer form, although he has now decided that it is in his own best interests to deny its validity and effect. Mr. Cochran emphasises, rightly, that there is no court finding that there has been any forgery."

24. After summarising the respective arguments of the parties, the Judge then identified the issue which he had to decide, as he saw it, at [48],

> "48. As it seems to me, the real issue in the present case is therefore whether, even on the footing that the share transfer form was a forgery, Jeanette should have been treated as a member of the [Company] for the purposes of the requirement to participate in the special resolution to place the [Company] into voluntary winding-up. It therefore seems to me that the real issue in the present case becomes one as to Jeanette's continuing status as a member when, on the evidence based on the filings at Companies House, her name did not, at that time, appear on the [Company's] register of members."

25. I agree that this was the correct issue that the Judge had to decide, but for the purposes of analysis, it is worth unpacking the reasons why this was so.

26. The issue raised by the IA Application was whether the appointment of the Liquidators was valid or not. That depended on whether the Written Resolution that the Company should be wound up voluntarily was valid and effective as a special resolution of the Company (as required by section 84(1)(b) of the Insolvency Act); and whether the resolution that the Liquidators should be appointed was also valid and effective as an ordinary resolution of the Company (in accordance with section 100(1) of the Insolvency Act).

27. The requirements for resolutions and written resolutions of a company are set out in Part 13 of the Companies Act. Section 281(1)(a) of the Companies Act provides that a resolution of the members of a company may be passed as a written resolution in accordance with Chapter 2 of Part 13. Section 282 provides that a written resolution is passed as an ordinary resolution if it is passed by members representing a simple majority of the total voting rights of "eligible members"; and section 283 provides that a written resolution is passed as a special resolution if it is passed by a majority of not less than 75% of the total voting rights of "eligible members". Sections 289 and 290 provide that "eligible members" are the members of a company who would have been entitled to vote on the resolution on the date on which the written resolution was sent to members for their agreement.

28. The issue in the instant case was thus whether, for the purposes of Part 13 of the Companies Act, when the Written Resolution was signed by Julie on 16 July 2021, Jeanette was an eligible member of the Company. If Jeanette was an eligible member, then the first part of the Written Resolution putting the Company into voluntary winding up was not signed by members holding at least 75% of the total voting rights of eligible members of the Company, and was thus invalid as a special resolution; and the second part appointing the Liquidators was also invalid as an ordinary resolution, because it was not signed by a simple majority (i.e. more than 50%) of the eligible members of the Company. Conversely, if Jeanette was not an eligible member of the Company at the relevant time, then Julie's signature was alone effective to make both parts of the Written Resolution valid.

29. Returning to the Judgment, the Judge gave his answer to the question that he had identified at [49]-[50],

> "49. Notwithstanding the provisions of section 127 of the Companies Act, it does seem to me that the register is conclusive as to those who were members of the [Company] at the time of the special resolution. Section 112(2) is, in my judgment, clear that every person whose name is entered in the [Company's] register of members is a member of the [Company]. That is reinforced by the power under section 125 that is conferred upon the court to rectify the register.
>
> 50. When one looks at the scheme of the Companies Act as a whole, it seems to me that the register is conclusive as to those who are members of the [Company] at any particular point in time. On that basis, even if the register of members were liable to be rectified, following a decision that the share transfer form was a forgery and of no effect, since Jeanette's name was not on the register at the time of the passing of the special resolution to wind-up the [Company], it seems to me that the [Company] was validly placed into voluntary winding-up."

The Judge therefore declared that the Liquidators' appointment was valid.

The arguments on appeal

30. In support of Jeanette's appeal, Mr. Fennell contended that the Judge was wrong to hold that the register of members is conclusive as to the identity of the members of a company. He submitted that it was clear from section 127(1) of the Companies Act that the register of members is only *prima facie* evidence of the matters required to be entered on it – which by section 113(3)(a) of the Act include "a statement of the shares held by each member".

31. In the instant case, Mr. Fennell submitted that such *prima facie* evidence of the membership of the Company was rebutted by the Judge's own assumption at [48], for the purposes of his analysis, that the Stock Transfer Form was a forgery. For good measure he contended that Julie's account in her Defence to the Part 7 Claim plainly indicated that she had executed the Stock Transfer Form without any authority from Jeanette. Mr. Fennell contended that this meant that the Stock Transfer Form was a nullity and that it was ineffective to transfer any right or entitlement to the 50 subscriber shares in the Company from Jeanette to Julie. He further contended that the Company was not entitled to act upon the Stock Transfer Form to register the transfer of such shares from Julie to Jeanette, so that Jeanette had not ceased to be a member of the Company in respect of her 50 subscriber shares.

32. Mr. Fennell submitted that this meant that the Written Resolution was invalid and ineffective as a special resolution to wind up the Company voluntarily under section 84(1)(b) of the Insolvency Act or as an ordinary resolution to appoint the Liquidators in accordance with section 100(1) of the Insolvency Act.

33. Mr. Fennell submitted that this outcome was in accordance with policy and good sense. He contended that the decision of the Judge opened the door to a fraudster obtaining control of a company by the simple expedient of forging a stock transfer form or making unauthorised alterations to the register of members, and thereafter using his status as a member to pass valid resolutions, e.g. putting the company into liquidation or assuming control of the board and misappropriating its assets, to the detriment of the true owners of the company and others interested in it, such as employees and creditors. He suggested that it would be wrong for mere entries on the register of members to have such far-reaching consequences; and that in any competition between two innocent parties, the loss should fall on those whose status was acquired through use of the void document.

34. In response, Mr. Doyle KC essentially contended that the Judge was right for the reasons that he gave. He submitted that section 112 of the Companies Act defines who the members of a company are, and that the Judge correctly identified that the scheme of the Companies Act is that the register of members maintained under section 113 is a conclusive statement as to the membership of the company at any point in time.

35. Mr. Doyle KC suggested that any other regime would be unworkable because it would mean that a company, its directors or third parties (such as an insolvency office-holder) would be unable to rely upon the register of members as an accurate statement of the membership when, for example, convening general meetings of the company or acting on the basis of resolutions passed at such meetings. He submitted that if a person contends that the register of members of a company is inaccurate, they have a remedy by way of an order for rectification of the register pursuant to section

125 of the Companies Act, but unless and until such an order is made, the register is conclusive.

36. Hence, Mr. Doyle KC submitted, the Judge was right to hold that, even on the basis that the Stock Transfer Form had been a forgery, Jeanette was not a member of the Company at the time of the Written Resolution because she did not appear as such on the register of members, so the resolutions contained in the Written Resolution had been validly passed by Julie as the sole member of the Company.

37. Mr. Doyle KC further emphasised (in case it was necessary for him to do so) that the principle that "fraud unravels all" had no application in the instant case because there had been no judicial finding that Julie had forged the Stock Transfer Form. He submitted that a finding of fraud or dishonesty was essential to a finding of forgery and he pointed out that Julie had denied in her Defence to the Part 7 Claim that she had forged the document, and that the Judge hearing the IA Proceedings had accepted Mr. Fennell's argument that it was unnecessary to investigate such matters further.

Assumptions

38. In common with the Judge, and in the absence of any objection from the parties, I shall approach the legal analysis on the assumption that the Company's accountants made appropriate entries on the Company's register of members, reflecting the electronic returns made to Companies House from time to time.

39. I shall also assume, for the purposes of my analysis, that the Stock Transfer Form was executed by Julie by forging Jeanette's signature on it. However, I should say at once that, for the reasons that follow, I do not think that it matters for the outcome of this case whether the Stock Transfer Form was forged (which is disputed), or simply executed by Julie without any authority from Jeanette (which is not disputed).

Analysis

40. I agree with Mr. Doyle KC that the starting point in defining the concept of a member is section 112 of the Companies Act. That provides, in relevant part,

> "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."

41. The requirement of a company to maintain a register of members is set out in section 113,

> "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.

(3) In the case of a company having a share capital, there must be entered in the register, with the names and addresses of the members, a statement of–

(a) the shares held by each member, distinguishing each share -

(i) by its number (so long as the share has a number), and

(ii) where the company has more than one class of issued shares, by its class, and

(b) the amount paid or agreed to be considered as paid on the shares of each member."

42. On a straightforward reading of section 112, it is apparent that a person may be a member of a company <u>either</u> as a result of subscribing to its memorandum (section 112(1)), <u>or</u> (if they are not a subscriber) by agreeing to become a member and being entered as a member on the register of members (section 112(2)).

43. The meaning and effect of section 112 was considered by the Supreme Court in <u>Enviroco Limited v Farstad Supply A/S</u> [2011] UKSC 16, [2011] 1 WLR 921 ("<u>Enviroco v Farstad</u>"). Surprisingly, this authority was not cited by either party to the Judge or to us, but we requested, and received, written submissions from the parties on it.

44. The case concerned the extent of an indemnity in a charterparty that used the expression "affiliate", which in turn incorporated the definition of "subsidiary" in what is now section 1159 of the Companies Act. So far as relevant, that provision provides,

"(1) A company is a "subsidiary" of another company, its "holding company", if that other company –

…

(c) is a member of it and controls alone, pursuant to an agreement with other members, a majority of the voting rights in it."

The question was whether a company (Enviroco) remained the subsidiary of another (ASCO) in circumstances in which ASCO had pledged its shares in Enviroco by way of security to a bank by a method which involved registration of the shares in the name of a nominee for the bank on Enviroco's register of members.

45. The Supreme Court held that Enviroco had not remained a subsidiary of ASCO because ASCO did not appear as a member in Enviroco's register of members and so what is now section 1159(1)(c) was not satisfied. In giving the leading judgment, with which the other members of the Supreme Court agreed, Lord Collins stated, at [37]-[39],

> "37. The starting point is that the definition of "member" in what is now section 112 of the [Companies Act 2006] … reflects a fundamental principle of United Kingdom company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified: in re Sussex Brick Co [1904] 1 Ch 598 (retrospective rectification of register did not invalidate notices).
>
> 38. Ever since the Companies Clauses Consolidation Act 1845 (8 & 9 Vict c 16) and the Companies Act 1862 (25 & 26 Vict c 89) membership has been determined by entry on the register of members. The companies legislation proceeds on that basis and would be unworkable if that were not so. Among the many provisions relating to members are these: (1) a member will be bound by alterations in the company's articles, subject to specified exceptions (section 25 of the 2006 Act); (2) there are elaborate provisions relating to the register of members (sections 113 et seq.), including a duty to keep an index of members (section 115) and rights to inspect and require copies (sections 116–121), and documents in hard copy form must be sent to a member at his address as shown in the register of members (Schedule 5, Part 2); (3) a subsidiary cannot be a member of its holding company (section 136); (4) elaborate provision is made for voting by members, by proxies appointed by members, and by joint holders (sections 281 et seq.); (5) the company must send its annual accounts and report to every member (section 423); (6) unlawful distributions may be recovered from a member who knows or has reasonable grounds for believing that it is unlawfully made: section 847(2).
>
> 39. For those and other purposes the legislation makes it clear that the member is the person on the register, and where it is necessary to apply the legislation to persons who are not on the register, special provision is made. Thus where the shares are bearer shares, special provision is made to allow the bearer to be deemed to be a member: section 122(3). So also the right

> of a member to bring a derivative claim or present an unfair prejudice petition is expressly extended "to a person who is not a member of a company but to whom shares in the company have been transferred or transmitted by operation of law": sections 260(5) and 994(2)."

46. Lord Collins' explanation at [37] of the "fundamental principle of United Kingdom company law" that "except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified", coupled with his observations at [38] that the provisions of the Companies Act (including those as regards voting by members) would be unworkable were that not so, clearly support the reasoning of the Judge at [49]-[50].

47. However, Lord Collins did not go as far as the Judge. Lord Collins did not say that the register of members was *conclusive* as to the identity of the members of a company. He acknowledged that the general principle that the identity of the members of a company is to be determined by reference to the entries on the register of members at the relevant time is subject to "express provision ... to the contrary".

48. One obvious example of an express provision to the contrary is to be found in section 112(1) in relation to the subscribers to a company's memorandum of association. The wording of section 112(1) makes it clear that a subscriber will be a member of the company as and from incorporation, irrespective of whether they are subsequently entered on the register of members. That was explained in paragraph 239 of the Explanatory Notes to the Companies Act, which stated,

> "239. This section restates section 22 of the [Companies Act 1985]. There are additional words to make it clear that the subscribers to the memorandum become members on registration of the company, even if the company fails to enter their names in the register of members."

49. It can therefore be seen that section 112(1) establishes a regime under which the subscribers will become members without being entered on the register. This is primarily to deal with the fact that there will inevitably be a gap in time between formation of a company and completion of its register, and also to deal with possibility that those in control might fail to make the necessary entries on the register of members. However, if the subscribers to a company's memorandum <u>are</u> duly entered on the register of members in accordance with section 112(1), there is nothing in any other provision of the Companies Act to suggest that their continued status thereafter, or the manner in which they might transfer their shares or cease to be members, should differ in any way from the regime that applies to members who acquire their shares after the formation of the company.

50. A second example of an express provision to the contrary which indicates that the entries on the register of members are not conclusive is to be found in section 112(2). As indicated above, for a person who is not a subscriber to become a member of a company, there are two requirements – (i) agreement to become a member and (ii) entry on the register. The agreement to become a member does not require a formal bilateral contract but simply unilateral assent: see <u>Nuneaton Borough AFC Limited</u>

[1989] BCLC 454. But if there is no such assent, then mere entry of a person's name on the register will not suffice to make that person a member: see Oakes v Turquand (1867) LR 2 HL 325.

51. Both these examples illustrate why, as section 127 of the Companies Act expressly provides, and as Mr. Fennell submitted, the register can only ever be *prima facie* evidence as to who the members of the company are. But neither example concerns a situation in which a person whose name has been properly entered on the register of members is *removed* from the register without her consent.

52. I also accept Mr. Fennell's submission that because Enviroco v Farstad concerned the operation of the Companies Act in a conventional business transaction, and was not a case of wrongful removal of a person from the register, it is not a binding authority on the question of whether the removal of a member's name from the register of members as the result of forgery or fraud operates as a further exception to the general principle outlined by Lord Collins.

53. In that latter regard, Mr. Fennell argued that the deletion of Jeanette from the Company's register of members should be regarded as a nullity, and that she should be regarded as still on the register for voting purposes because the Stock Transfer Form upon which such deletion was based was a forgery, and would have been known to be a forgery by Julie who authorised such deletion as sole director of the Company. Mr. Fennell relied upon Ruben v Great Fingall Consolidated [1906] AC 439 ("Ruben") in that regard.

54. In Ruben, the secretary of a company asked his stockbrokers to arrange a personal loan for him from a bank, which was to be secured on 5,000 shares in the company. The secretary forged a stock transfer form for 5,000 shares in favour of nominees for the bank and thereafter also caused a forged share certificate to be issued to the bank's nominees. When the secretary did not repay the loan and absconded, the company refused to register the bank as holder of the shares represented by the forged certificate. The stockbrokers then repaid the bank, took an assignment of the bank's rights against the company, and sued the company for damages, either for refusing to register it as a shareholder or on the basis that the company was vicariously liable for the fraud of the secretary.

55. The trial judge held the company liable, but that decision was reversed by the Court of Appeal, whose decision was affirmed by the House of Lords. The reason was shortly stated by Lord Loreburn LC at 443,

> "I cannot see upon what principle your Lordships can hold that the defendants are liable in this action. The forged certificate is a pure nullity. It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management, and will not be affected by irregularities of which they had no notice. But this doctrine, which is well established, applies only to irregularities that otherwise might affect a genuine transaction. It cannot apply to a forgery.
>
> Another ground was pressed upon us, namely, that this certificate was delivered by [the secretary] in the course of his

> employment, and that delivery imported a representation or warranty that the certificate was genuine. He had not, nor was held out as having, authority to make any such representation or to give any such warranty. And certainly no such authority arises from the simple fact that he held the office of secretary and was a proper person to deliver certificates."

56. The ratio of Ruben was very simply that the company could not be made liable for a refusal to register the bank's nominees as the holders of shares, because the forged share certificate was a nullity and had not been issued with the authority of the company. The House of Lords held that the company had rightly refused to act on the basis of forged documents and the third party could not rely upon the "indoor management" rule to bind the company. Ruben did not, however, involve the wrongful removal of anyone from the register of members on the basis of a forged document. I therefore do not see that it can have any relevance to the instant case beyond the uncontroversial proposition that a forged document is a nullity. Specifically, Ruben does not assist in analysing, for the purposes of voting on members' resolutions, the status of a person whose name is wrongly removed from a company's register of members as a result of a forged stock transfer.

57. Apart from relying upon Ruben and other cases that have followed it in similar circumstances such as South London Greyhound Racecourses v Wake [1931] Ch 496, Mr. Fennell did not cite any authority to us in support of the proposition that a person whose name is wrongly removed from the register of members as a consequence of a forged transfer still retains the status of a member for voting purposes.

58. In my judgment, in the absence of such authority, the general principle explained by Lord Collins in Enviroco at [37] should apply for the purposes of determining the validity of members' resolutions, even in a case where a member's name has been wrongly removed from the register as a result of forgery or fraud. The law does not simply disregard the entries on the register. Instead, the entries on the register of members are presumptively valid and the members of a company are taken to be those shown on the register "*unless and until the register is rectified*".

59. A company cannot simply alter its register of members to remove the name of a registered holder of shares without a court order: re Derham and Allen [1946] Ch 31 at 36. Accordingly, as occurred in the instant case, it is necessary for a person who contends that their name has wrongly been taken off the register to apply to the court for an order that the register be rectified, putting them back onto the register in place of the person whose name wrongly appears on the register. The application to the court can be made under section 125 of the Companies Act (which provides a summary jurisdiction for simple cases) or in an ordinary CPR Part 7 claim (for other cases): see Nilon v Royal Westminster Investments SA [2015] UKPC 2 at [37].

60. A clear example of rectification by the court in a case of forgery is re Bahia and San Francisco Railway Company Limited (1868) LR 3 QB 584 ("Bahia"). In that case, T, the registered holder of shares, had left the share certificates in the hands of her broker. The broker forged T's signature on a stock transfer form in favour of S and G. That was submitted for registration to the company and new share certificates were issued to S and G. S and G then sold the shares on to B and C who were registered as members of the company.

61. When the forgery was discovered, T obtained an order for rectification of the register under section 35 of the Companies Act 1862 (the predecessor of what is now section 125 of the Companies Act), putting her back onto the register in place of B and C. There was no suggestion that the court should simply have declared the entries on the register to be of no legal effect.

62. The court in Bahia then also made two orders dealing with matters consequential upon the rectification of the register. The first was to order the company to pay T any dividends that had fallen due on the shares during the time she had wrongly been off the register. The second, following the statement of a special case in the application for rectification, was to order the company to pay compensation to B and C for the loss of the shares, calculated as at the date upon which they had been displaced from the register by T, together with interest.

63. That approach is also consistent with the approach taken in International Credit and Investment (Overseas) Ltd v Adham [1994] 1 BCLC 66 ("Adham"). In that case, a member had simply been taken off the register and other persons had been inserted in dubious circumstances, and without any transfer documentation at all (in clear contravention of what is now section 770 of the Companies Act). The court did not, however, simply disregard the entries on the register. Instead, it declared that the persons who appeared on the register held the shares as bare trustees for the person whose name had been wrongly removed, and ordered the register to be rectified by the deletion of the names that wrongly appeared on the register and the reinstatement of the original member.

64. In addition to making consequential orders to deal with events that have occurred whilst the register of members was in an incorrect state, the court also has the power to order that the register be rectified with retrospective effect. That is well illustrated by the case of re Sussex Brick Co Limited [1904] 1 Ch 598 ("Sussex Brick") to which Lord Collins referred in Enviroco v Farstad.

65. In Sussex Brick, two joint transferees of shares sent their transfer to the company for registration in the usual way, but by mistake or oversight the company failed to register the transfer or enter them on its register of members. Subsequently the company passed a special resolution for a voluntary winding-up with a view to reconstruction, whereupon the transferees served the liquidator with notice of dissent under section 161 of the Companies Act 1862. That section provided that, upon receipt of such a notice from a person who was a member of the company at the time of the special resolution, the liquidator either had to abstain from carrying out the proposed reconstruction or purchase the dissentient member's interest.

66. The liquidator ignored the transferees' notice under section 161 on the ground that, because they had not been entered on the register of members, they were not members of the company within the meaning of section 161 at the time of the resolution to wind up the company. The transferees therefore applied to the court for rectification of the register of members with retrospective effect so as to place them onto the register with effect from the day before the resolution for voluntary winding up was passed. The judge at first instance made an order for rectification placing the transferees on the register of members, but refused to do so with retrospective effect.

67. The Court of Appeal allowed the transferees' appeal and ordered that they be placed on the register with retrospective effect dating back to the day before the passing of the special resolution that the company be wound up, so that their notice of dissent under section 161 would be valid. Vaughan Williams LJ stated, at page 605,

> "Now, in this case there can be no doubt but that the names of these gentlemen ought to have been on the register at a date earlier than the time of the holding of the meetings in relation to the reconstruction of this company. Under those circumstances, when one looks at re Joint Stock Discount Company (1866) LR 3 Eq 77 ("Nation's Case"), which was a decision by Lord Romilly MR, there can be no doubt that that is an authority for the proposition that when it is right that an order for rectification should be made - whether the order be for rectification by taking a name off the register or by putting a name on - the Court may make an order, not only that the right name shall be put on or taken off, as the case may be, but that the register shall be treated as if the name had been on or off at the time it ought in fact to have been on or off."

68. After rejecting an argument that such an order could not be made after liquidation under the particular section of the 1862 Act upon which the transferees had relied, Vaughan Williams LJ continued, at page 606-7,

> "I have only to add this, that I do not mean for a moment to suggest that any one is entitled to such an order *ex debito justitiœ*; it is a matter in the discretion of the judge, and there might be cases in which the judge, although he considered such an order essential to completely establishing the rights of the applicant, might refuse to do so because he thought it would work injustice to other members of the company. If I thought here that such an order would work injustice to other persons, especially to persons who are not in any way bound by the mistake of the company, I should feel considerable hesitation in making the order; but in the present case there is no evidence before us that any injustice will be caused at all. It has been suggested that if we make the order asked for we shall invalidate the resolutions, because the meetings will not have been properly called; and other suggestions of a similar kind were made in the course of the argument. As the matter stands, we can do justice and prevent any wrong accruing to these two gentlemen … without doing any injustice to anyone else."

69. Stirling and Cozens-Hardy LJJ gave concurring judgments. At pages 608-609 Stirling LJ stated,

> "[Nation's Case] is, therefore, an authority that in a proper case the Court has power to fix a date as from which the change in the register is to be made operative. But then after that there arises a point which requires serious consideration. The application of the appellants here is, in substance, that the

> registration be made *nunc pro tunc*. Now, when an order of that sort is made the Court ought to be very careful to see that it does no injustice by making the registration retrospective. I may point out that the power which is conferred by section 35 [of the Companies Act 1862] is not imperative. All it says is that the Court "may" in a proper case make an order for rectification. Therefore the Court has full discretion to deal with every particular case which comes before it in such a way as may do complete justice; but in the present case I fail to see that any injustice can be done if the alteration is made as asked."

70. Vaughan Williams LJ's rejection of the argument that the making of an order for retrospective rectification of the register would invalidate the special resolution for winding up was a reference back to an exchange that took place during argument. That exchange was reported at pages 603-604,

> "(*Gore-Browne KC for the liquidators*) In the present case, if the argument of the appellants … is right, and they were in truth members of the company before the meetings in question, it follows that they ought to have had notice of the meetings, and it may be that as they had no notice the meetings were badly held, the resolutions passed are void, and there is no liquidation at all.
>
> (*Vaughan Williams LJ*) It is not suggested that, in remedying the injury done to these appellants by the unnecessary delay in the registration of their transfers, injury should be done to other people, such as by holding the meetings to be bad. The only question is whether these shareholders who expressed their dissent from the resolutions are, for the purposes of that dissent, to be treated as having had their names on the register before the meetings, or at all events before the confirmatory meeting. I cannot conceive why they should not. That would not affect the validity of the meetings or the validity of any proceedings under them in the slightest degree. In Nation's Case no one suggested that the order there made would have the effect of making any resolution or any subsequent proceedings bad."

71. As I see it, the power of the court to make consequential orders dealing with events that have occurred whilst the register was not in the correct state (Bahia), coupled with the power to order rectification with retrospective effect (Sussex Brick), provide the answer to Mr. Fennell's contention that to treat the entries on the register as determinative of the membership of a company for voting purposes would open the door to fraudsters and forgers. In short, the court has the power when making an order for rectification of the register of members, so far as legally possible, to undo the effects of such misconduct, to order compensation to be paid, or to determine how losses should be fairly allocated between innocent parties.

72. It is also clear from Sussex Brick that the issue of whether rectification should be ordered with retrospective effect is a matter of discretion for the court. It follows that

if retrospective rectification might arguably invalidate any subsequent meetings or resolutions of the members, and thereby cause prejudice to other members or third parties who have acted in reliance on the resolutions, the court has a discretion not to order retrospective rectification at all, or only to order it on terms. On the facts of Sussex Brick, the members of the Court of Appeal considered that the resolutions for winding up would remain valid and effective, even if an order for retrospective rectification of the register was made for the purpose of validating the appellants' notice of dissent under section 161 of the Companies Act 1862.

The result in the instant case

73. Applying these principles to the instant case, it seems to me that unless and until an order for rectification was made, the identity of the members of the Company for the purposes of determining the validity of the Written Resolution was to be determined by the entries in the Company's register of members at the relevant time.

74. When the Judge made his order staying the winding up of the Company on 28 October 2022 it was envisaged that the IA Application should be restored before the trial judge hearing the Part 7 Claim for rectification of the register. In accordance with the decision in Sussex Brick, this would have enabled the trial judge to consider the appropriate orders to make. The trial judge could have considered whether the Company's register of members should be rectified so as to put Jeanette's name back onto the register with retrospective effect in light of any effect that might have had upon the Written Resolution and/or whether any ancillary orders should be made to achieve justice as between the parties and the Liquidators.

75. However, for reasons that were not explained to us, that course was not followed. Instead, Jeanette, Darren and Julie chose to compromise the Part 7 Claim upon the terms of the agreement between them that was annexed to the Tomlin Order. Surprisingly, given that the Part 7 Claim was a claim for rectification of the register of members, that agreement did not address the status of the relevant entries on the Company's register of members at all. It did not, for example, contain any express acknowledgment by Julie that she held the legal title to the shares that had been the subject of the Stock Transfer Form on a bare trust for Jeanette (following the approach in Adham). Nor did it provide for the court to be asked to make an order rectifying the Company's register of members in respect of those shares. And since no such order was sought, the agreement did not provide any opportunity for the Liquidators, who were not parties to the agreement, to address argument about whether any such order ought to be made retrospectively or not, and if so, on what terms.

76. In the absence of any such court order having been made for rectification of the Company's register of members with retrospective effect, I consider that the Judge hearing the IA Application was right to rely upon the (presumed) state of the register of members when considering the validity of the Written Resolution. He was therefore right to hold that Julie was the only member of the Company at the relevant time, that the resolutions contained in the Written Resolution were valid and effective, and that the Liquidators were validly appointed.

77. I would therefore dismiss the appeal.

Lady Justice Asplin:

78. I agree.

Lady Justice King:

79. I also agree.